Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

FACCHIANO CONSTRUCTION COMPANY, INC., MICHAEL FACCHIANO, SR., MICHAEL FACCHIANO, JR., and JOHN FACCHIANO,

Petitioners,

v.

THE UNITED STATES DEPARTMENT OF LABOR, THE SECRETARY OF LABOR, LYNN MARTIN, in her official capacity, JOHN R. FRASER, ACTING ADMINISTRATOR, WAGE AND HOUR DIVISION, in his official capacity, and THE COMPTROLLER OF THE UNITED STATES OF AMERICA, ROBERT L. CLARKE, in his official capacity,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED

1. Where the Executive Branch of the United States, through the Department of Housing and Urban Development, which is co-extensively responsible with the Department of Labor for the enforcement of certain federal labor standards, proceeds with debarment arising out of certain conduct relating to the violations of such standards, is the United States barred by the doctrines of *res judicata* and collateral estoppel from later proceeding, through the Department of Labor, with an additional debarment based upon the same underlying conduct and labor standards violations?

2. Where the regulations of the Department of Labor expressly authorize the debarment only of a "contractor or subcontractor", did the Third Circuit err in concluding that the debarment of corporate officers, who are not parties to any contract or subcontract, is authorized under these regulations?

LIST OF PARTIES

All parties to the proceedings below are identified in the caption of this Petition. Pursuant to Supreme Court Rule 29.1, Petitioners state that there are no parent companies or subsidiaries of Facchiano Construction Company, Inc.

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FACCHIANO CONSTRUCTION COMPANY, INC., MICHAEL FACCHIANO, SR., MICHAEL FACCHIANO, JR., and JOHN FACCHIANO,

Petitioners,

v.

THE UNITED STATES DEPARTMENT OF LABOR, THE SECRETARY OF LABOR, LYNN MARTIN, in her official capacity, JOHN R. FRASER, ACTING ADMINISTRATOR, WAGE AND HOUR DIVISION, in his official capacity, and THE COMPTROLLER OF THE UNITED STATES OF AMERICA, ROBERT L. CLARKE, in his official capacity,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Facchiano Construction Company, Inc., Michael Facchiano, Sr., Michael Facchiano, Jr., and John Facchiano, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in these proceedings on March 8, 1993.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit (Appendix A, *infra*) is reported at 987 F.2d 206 and was filed on March 8, 1993. The United States Magistrate's Report and Recommendation (Appendix B, *infra*) was entered on March 3, 1992 and is not reported. The Order of the United States District Court for the Western District of Pennsylvania (Appendix C, *infra*) at Civil Action No. 91-1670 was entered on March 23, 1992 and is not reported. The United States Department of Labor Wage Appeals Board decision (Appendix D, *infra*) at WAB Case No. 91-06 was entered on August 29, 1991 and is not reported. The Decision and Order of George P. Morin, Administrative Law Judge (attached as part of Appendix D, *infra*) at Case No. 87-DBA-14 was entered on September 27, 1990 and is not reported.

In a previous related action, the United States Magistrate's Report and Recommendation (Appendix E, *infra*) was entered on December 16, 1987 and was reported at 108 Lab. Cas. (CCH) ¶ 35071. The Order of the United States District Court for the Western District of Pennsylvania (Appendix F, *infra*) at Civil Action No. 86-2711 was entered on February 16, 1988 and is not reported. The Opinion of the United States Court of Appeals for the Third Circuit in this related matter is reported at 859 F.2d 1163 and was filed on October 21, 1988 (Appendix G, *infra*). The Order of the United States Court of Appeals for the Third Circuit (Appendix I, *infra*) denying Appellants' Sur Petition for Panel Rehearing and Suggestion for a Rehearing in Banc, was filed on November 22, 1988 and is not reported. The Order of the Supreme Court of the United States denying the Petition for Writ of Certiorari

of Michael Facchiano, Jr., John Facchiano and Facchiano Construction Company, Inc. (Appendix H, *infra*) was entered on June 5, 1989 and is reported at 490 U.S. 1097.

STATEMENT OF JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Third Circuit was entered on March 8, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This Petition is timely filed with the Court under 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.4.

STATUTES AND REGULATIONS INVOLVED IN THE CASE

The relevant statutory and regulatory provisions are:

A. Reorganization Plan No. 14 of 1950, as amended, 5 U.S.C. App. 1

B. The Davis-Bacon Act, as amended, 40 U.S.C. §§ 276a, *et seq.*

C. 40 U.S.C. § 276c. Regulations governing contractors and subcontractors

D. The Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. § 327, *et seq.*

E. The Housing and Community Development Act of 1974, as amended, 42 U.S.C. § 5301, *et seq.*, and 42 U.S.C. § 1437, *et seq.*

F. Department of Labor, *Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction*, 29 C.F.R. § 5.1, *et seq.*

G. Department of Housing and Urban Development, *Debarment, Suspension and Ineligibility of Contractors and Grantors; Administrative Sanctions*, 24 C.F.R. § 24.0, *et seq.* (1985)

Pertinent portions of the statutory and regulatory provisions are reproduced at Appendix K, *infra*.

STATEMENT OF THE CASE

This case presents the issue of whether the doctrine of *res judicata* permits the Executive Branch of the federal government, which has already debarred a contractor and a corporate official thereof, in one agency proceeding, to bring a second agency action seeking another, longer period of debarment based upon the same conduct. Also presented is the issue of whether the Department of Labor may debar individual officers of a corporate contractor or subcontractor pursuant to its regulations which expressly limit such debarment to contractors or subcontractors.

Petitioners, Facchiano Construction Company, Inc., Michael Facchiano, Sr., Michael Facchiano, Jr. and John Facchiano appeal from a decision of the United States Court of Appeals for the Third Circuit affirming the District Court's entry of summary judgment in favor of the Respondents and allowing the Department of Labor

to debar the Petitioners.[1] Petitioners seek reversal of the Court of Appeals' Order and a remand of this case with instructions for the entry of summary judgment in favor of all Petitioners, on the ground that they are entitled to relief as a matter of law based upon the doctrines of *res judicata* and/or collateral estoppel. In the alternative, Petitioners, Michael Facchiano, Sr., Michael Facchiano, Jr. and John Facchiano seek a reversal of the Court of Appeals' Order and a remand of this case with instructions for entry of summary judgment in their favor on the ground that under the Department of Labor's regulations, individual officers of corporate contractors or subcontractors cannot be debarred.

This action was brought by Facchiano Construction Company, Inc., Michael Facchiano, Sr., Michael Facchiano, Jr. and John Facchiano (hereinafter collectively referred to as "the Facchianos" or "the Petitioners") in the United States District Court for the Western District of Pennsylvania (hereinafter referred to as "the District

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[1] The Third Circuit vacated the District Court's Order with regard to the debarment of Michael Facchiano, Sr. on the ground that the Wage Appeals Board did not make the appropriate determination regarding the grounds for debarment. App. 19; 987 F.2d at 215. The Third Circuit remanded with regard to Michael Facchiano, Sr. to the District Court with instructions to remand to the Wage Appeals Board to make the appropriate determination as to whether Michael Facchiano, Sr. was actually engaged in aggravated or willful violations of federal labor standards. *Id.* Insofar as the Third Circuit's ruling that *res judicata* and collateral estoppel do not prohibit the debarment of Michael Facchiano, Sr., he appeals that determination, and also from the determination that the Department of Labor's regulations authorize the debarment of corporate officers.

Court") against the within Respondents, the United States Department of Labor, its officials, Lynn Martin and John R. Fraser, in their official capacities, and Robert L. Clarke, the Comptroller General of the United States, in his official capacity (hereinafter collectively referred to as "Labor" or "the Respondents"). The District Court had jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1346 and 1361. In this action, the Facchianos sought, *inter alia*, to permanently enjoin Labor from debarring them from receiving federal government contracts or subcontracts and a reversal of decision of the Department of Labor Wage Appeals Board (hereinafter referred to as "the Board") imposing a three-year debarment relative to all government contracts. The parties filed cross-motions for summary judgment. In an Order dated March 23, 1992, the District Court, by the Honorable Alan N. Bloch, adopted as the Opinion of the Court, the Report and Recommendation of United States Magistrate Judge Robert C. Mitchell. Thus, the District Court granted Labor's Motion for Summary Judgment and denied the Facchianos' Motion for Summary Judgment. On April 16, 1992, the Facchianos filed a Notice of Appeal from that Order.

During the period from January 1, 1982 through September, 1984, Facchiano Construction Company, Inc. (hereinafter referred to as "the Corporation") was a contractor on eighteen contracts awarded and funded through community development block grants administered by the United States Department of Housing and Urban Development (hereinafter referred to as "HUD"). The contracts required payment of wages in accordance with the labor standards provisions of two Davis-Bacon

Related Acts, the Housing and Community Development Act of 1974, 42 U.S.C. §§ 1440(g) and 5310, and the *Contract Work Hours and Safety Standards Act*, 40 U.S.C. § 327 *et seq*. On all but one of the contracts, prevailing wages were not paid. However, certifications were submitted indicating compliance with federal labor standards including the payment of prevailing wages.

In the Summer of 1984, Labor commenced an investigation to determine whether there had been violations of federal labor standards. Subsequently, Michael Facchiano, Jr. and the Corporation entered into an agreement pursuant to which they agreed, *inter alia*, to plead guilty to violations of federal mail fraud laws. On February 22, 1985, Michael Facchiano, Jr. and the Corporation each plead guilty to two counts of mail fraud. They were each fined $1,000 and Michael Facchiano, Jr. was sentenced to a six-month prison sentence and a probationary period of five years.

On May 15, 1985, HUD notified Michael Facchiano, Jr. and the Corporation that they were immediately suspended from further participation in HUD programs, pending a proposed debarment. On March 15, 1986, a HUD administrative law judge entered an order debarring Michael Facchiano, Jr. and the Corporation for a period of 18 months commencing on the effective date of the initial suspension and continuing until November 15, 1986. (These proceedings are hereinafter referred to as "the HUD Debarment").

On December 13, 1985, after the submission of briefs and documentary evidence in the HUD Debarment, Labor notified the Facchianos of its intention to debar

them based upon the same investigation, violations and convictions relied upon in the HUD Debarment. (The Labor debarment proceedings are hereinafter referred to as "the Labor Debarment"). However, Labor took no further action until just weeks before the expiration of the HUD Debarment, when on October 2, 1986, Labor scheduled a hearing on its debarment.

On December 22, 1986, Michael Facchiano, Jr., John Facchiano and the Corporation filed a Complaint in the United States District Court for the Western District of Pennsylvania against the Department of Labor and its officers seeking a permanent injunction against the Labor Debarment. The District Court granted summary judgment in favor of the Department of Labor and its officers, holding that the doctrines of *res judicata* and collateral estoppel did not bar the Department of Labor proceedings.

An appeal was taken to the United States Court of Appeals for the Third Circuit. On October 21, 1988, the Third Circuit affirmed the grant of summary judgment denying Plaintiffs' claim for injunctive relief. *Facchiano v. United States Department of Labor*, 859 F.2d 1163 (3d Cir. 1988). However, the Third Circuit vacated the District Court's Opinion insofar as it adjudicated the merits of Plaintiffs' causes of action, finding instead that the issues of *res judicata* and collateral estoppel raised by the Corporation, Michael Facchiano, Jr. and John Facchiano should be first addressed in administrative proceedings. *Id.* The Corporation, Michael Facchiano, Jr. and John Facchiano filed a Petition for Writ of Certiorari with this Court which denied the Petition on June 5, 1989. 490 U.S. 1097.

Subsequently, matters proceeded to a hearing on January 18, 1990 before the Department of Labor Administrative Law Judge George P. Morin. After the submission of evidence, testimony and post-hearing briefs, ALJ Morin, in a decision dated September 27, 1990, held the doctrines of *res judicata* and collateral estoppel did not prohibit the Labor Debarment. However, Judge Morin concluded that 29 C.F.R. § 5.12(a)(1) did not authorize the debarment of the individual officers and only the Corporation could be debarred. Judge Morin debarred the Corporation for only 18 months, because of the Facchianos compliance with the HUD Debarment. Thereafter, both the Department of Labor and the Facchianos filed a Petition for Review to the Department of Labor Wage Appeals Board which issued its Decision on August 29, 1991, reversing the Order of ALJ Morin, and imposing a three-year period of debarment on the Facchianos.

The Facchianos then commenced an action in the District Court which culminated in the Order of March 23, 1992 granting summary judgment in favor of Labor. The Facchianos then appealed to the United States Court of Appeals for the Third Circuit which vacated the entry of summary judgment against Michael Facchiano, Sr. and remanded to the District Court with instructions to remand to the Wage Appeals Board for further proceedings to determine whether he actually perpetrated aggravated and willful violations of federal labor standards. The remainder of the District Court's Order was affirmed by the Third Circuit Court of Appeals.

This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

I. THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL PROHIBIT THE EXECUTIVE BRANCH OF THE UNITED STATES GOVERNMENT, ACTING THROUGH THE DEPARTMENT OF LABOR, FROM DEBARRING THE PETITIONERS WHERE THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ANOTHER AGENCY OF THE EXECUTIVE BRANCH, HAS ALREADY IMPOSED SUCH A PENALTY BASED UPON THE SAME CONDUCT AND INVESTIGATION.

Res judicata or claim preclusion bars the assertion of further claims by parties or their privies based upon the same claim where there has been a final judgment on the merits. *Nevada v. United States*, 463 U.S. 110 (1983). *Res judicata* prevents litigation of all grounds for, or defenses to, recovery, regardless of whether they were asserted or determined in the prior proceeding. *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940). In the instant case, the Third Circuit held that *res judicata* was inapplicable because there is no privity between Labor and HUD, and because the Executive Branch asserted different claims in the respective debarment proceedings. App. 9-14; 987 F.2d at 211-213. Thus, for reasons set forth below, the Third Circuit erroneously decided federal questions in a way which conflicts with the applicable decisions of this Court. *See* Supreme Court Rule 10.1(c). Moreover, in deciding the preclusion issues and allowing the Labor Debarment to proceed, the Third Circuit has departed significantly from the usual course of judicial proceedings, and has sanctioned a similar departure by the District Court and the administrative tribunals in this

action. *See* Supreme Court Rule 10.1(a). Review by this Court is therefore warranted.

A. LABOR AND HUD ARE IN PRIVITY FOR PURPOSES OF RES JUDICATA.

Relying on *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940), the Third Circuit concluded that Labor and HUD are not in privity for purposes of *res judicata*. The Third Circuit erroneously concluded that because HUD could only impose debarment with regard to HUD programs, HUD and Labor were not in privity. App. 9-13; 987 F.2d at 211-212. This determination is in direct conflict with this Court's decision in *Sunshine Coal* which is the leading case of this Court with regard to the determination of whether different parts of the Executive Branch are in privity for *res judicata* purposes.

In *Sunshine Coal*, the National Bituminous Coal Commission (hereinafter referred to as "the Commission") denied Sunshine Anthracite Coal Company (hereinafter referred to as "Sunshine") an exemption from an excise tax, finding that the coal in question was not "bituminous" within the meaning of the Bituminous Coal Act of 1937. Sunshine then commenced a second suit to enjoin the Internal Revenue Service (hereinafter referred to as "the IRS") from collecting the tax. The Court found that there was privity between the Commission and the IRS for the purposes of *res judicata* holding:

> . . . *The authority of the Commission is clear.* There can be no question that it was authorized to make the determination of the status of appellant's coal under the Act. It represented the

> United States in that the determination and delegation of that power to the Commission was valid, as we have said. *That suit therefore bound the United States, as well as the appellant [the IRS]. When a suit binds the United States, it binds its subordinate officials.*

310 U.S. 403 (emphasis added). Thus, the Court concluded that the Commission had the authority to bind the United States, which in turn bound the IRS.

In *Sunshine Coal*, the Court thus recognized the principle that a subordinate official of the federal government,[2] acting within the scope of a valid delegation of executive power, binds the United States government, and in turn, thereby binds other subordinate officials. *See United States v. Peppertree Apartments*, 942 F.2d 1555 (11th Cir. 1991), *vacated on other grounds, Bailes v. United States*, ___ U.S. ___, 112 S. Ct. 1755 (1992); *Mervin v. FTC*, 591 F.2d 821 (D.C. Cir. 1978); *George H. Lee Co. v. FTC*, 113 F.2d 583 (8th Cir. 1940); *see also, Manfra v. Koch*, 666 F. Supp. 637 (S.D.N.Y. 1987). In short, as long as a government agency's exercise of power is pursuant to a valid delegation of executive power, *i.e.*, as long as that agency has the *authority* to act, that action is binding on other agencies within the Executive Branch. In debarring the Facchianos, HUD was acting pursuant to, and within the scope of a valid delegation of executive power, thereby binding the United States and its subordinate agencies

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[2] The term "subordinate" in the context of subordinate officials of the United States government refers to an official's subordination to the United States government and is not intended to define any relationship or degree of authority between and among such officials.

and officials, including Labor. Thus, Labor is in privity with HUD.

In light of the clear authority of this Court in *Sunshine Coal* to the contrary, the Third Circuit's emphasis on the limited nature of the HUD Debarment is misplaced. App. 11-13; 987 F.2d at 211-212.[3] The Third Circuit's finding of no privity misapplied this Court's decision in *Sunshine Coal* and did so in derogation of the applicable statutory and regulatory scheme.

Reorganization Plan No. 14 of 1950, 5 U.S.C. App. 1 (hereinafter referred to as "Plan No. 14") is the framework for the promulgation and enforcement of the federal labor standards implicated in this case. Plan No. 14 imposes two duties on Labor. First, Plan No. 14 requires the Secretary of Labor to "prescribe appropriate standards, regulations, and procedures, which shall be observed by [the federal agencies responsible for the administration of federal labor standards]." Thus, Plan No. 14 expressly provides for the enforcement of federal labor standards by agencies other than Labor, such as HUD, and does not foreclose such agencies from independently pursuing debarment or other enforcement actions. *See also*, Message of the President, March 13,

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[3] Having chosen to seek relief in a forum offering only limited remedies, that is, in the HUD Debarment, the Executive Branch is now foreclosed from proceeding on the same claim in a different forum to seek greater relief. Restatement (Second) of Judgments § 24, comment g ("The plaintiff, having voluntarily brought his action into a court which can grant him only limited relief, cannot insist upon maintaining another action on the claim."); *see also Nevada v. United States*, 463 U.S. 108, 130, n. 12 (1983).

1950, 5 U.S.C. App. 1. ("The actual performance of enforcement activities . . . will remain the duty of respective agencies awarding contracts and providing Federal assistance.") Second, as a means of further coordinating the enforcement of federal labor standards, Plan No. 14 requires Labor to "cause to be made . . . such investigations" as Labor deems desirable. *Id.* Thus, while under Plan No. 14, Labor is the coordinating agency with regard to the enforcement of federal labor standards,[4] it is clear that the actual enforcement of the federal labor standards is co-extensive, and Labor's powers in that regard are shared with other agencies, such as HUD.

The Third Circuit's decision fails to take into account this regulatory scheme. Pursuant to the Department of Labor's coordination functions under Plan No. 14, it conducted an investigation into the conduct underlying the labor standards violations. Nonetheless, *and in furtherance of its coordination functions,* Labor permitted HUD to proceed with debarment despite the fact that the relief available under Labor's regulations (three-year debarment from all government contracts) both included and exceeded that available in the HUD Debarment. Having thus exercised its coordination functions by investigating and then permitting its privy, HUD, to proceed, Labor is now foreclosed from seeking additional relief. *EEOC v. United States Steel Corp.*, 921 F.2d 489, 493 (3d Cir. 1990) (quoting *Bruszewski v. United States*, 181 F.2d 419, 423 (3d

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[4] As set forth above, Labor is the coordinating agency under Plan No. 14 in that Labor prescribes the applicable standards and has the power to order investigations as a way of overseeing the implementation of the standards.

Cir. 1950)) ("Privity . . . 'is merely a word used to say that the relationship between one who is a party on the record and another who is close enough to include that other within the res judicata' "); *see also, Mervin, supra,* 591 F.2d at 830 (*res judicata* or claim preclusion bars suit against Federal Trade Commission because of privity between that agency and Civil Service Commission).

An examination of the Secretary of Labor's exercise of coordination functions in light of the relationship between HUD and Labor as cabinet departments of the Executive Branch compels the same conclusion. It is well-established that "the acts of heads of departments [such as HUD and Labor] within the scope of their powers, are in law the acts of the President." *Wolsey v. Chapman,* 101 U.S. 755, 769 (1879). Furthermore, all acts of department heads are presumably made pursuant to the express orders of the President. *Scott v. Carew,* 196 U.S. 100, 110 (1905). Therefore, it must be presumed that Labor, in exercising its coordination functions, and HUD, in proceeding with its debarment, acted under the express direction of the President. As a result of this control by the President as Chief Executive, when one department acts "in respect to any purely executive function appropriate to that department, every other department of the government is bound by the action." *Peirce v. United States,* 1 Cl. Ct. 279-80 (1865), *affirmed,* 74 U.S. 66 (1868) (emphasis added). Having chosen the relief available in the HUD Debarment, the Executive Branch may not seek further relief and Labor is bound by the HUD Debarment.

For the purposes of giving *res judicata* effect to the HUD Debarment, Labor and HUD were in privity and the Third Circuit erred in concluding to the contrary.

B. THE EXECUTIVE BRANCH OF THE GOVERNMENT ASSERTED THE SAME CLAIM IN BOTH THE HUD DEBARMENT AND THE LABOR DEBARMENT.

In concluding that for *res judicata* purposes the respective debarment proceedings involved different claims, the Third Circuit employed a superficial analysis based primarily upon the "different evidence" allegedly involved in the respective proceedings. App. 13; 987 F.2d at 212-213.[5] The Third Circuit's conclusion based upon this alleged "different evidence" misunderstands the doctrine of *res judicata*, as well as what was actually at issue in the respective debarment proceedings.

Res judicata "is thought to turn on the essential similarity of underlying events giving rise to the various legal claims. . . ." *Davis v. United States Steel Supply Div. of United States Steel Corp.*, 688 F.2d 166, 171 (3d Cir. 1982); *see also, United States v. Nevada, supra.* It is therefore enigmatic that the Third Circuit, while acknowledging

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[5] In addition to emphasizing supposed differences in evidence, the Third Circuit also asserted that the respective debarment proceedings were initiated pursuant to different statutes, and that different relief was sought in the proceedings. App. 13-14; 987 F.2d at 212-213. It is well-established that the existence of a different statutory or regulatory ground for relief is not itself determinative of the existence of the same claim. *Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470 (1930); *United States v. Athlone Industries, Inc.*, 746 F.2d 977 (3d Cir. 1984). Furthermore, the fact different relief is sought in the second proceeding is not dispositive as to whether the same claim is asserted in both proceedings. *Id; United States v. Moser*, 266 U.S. 236 (1924); *Clemens v. Central R. Co. of New Jersey*, 399 F.2d 825 (3d Cir. 1968).

that the same conduct and circumstances were at issue in both debarment proceedings, App. 13; 987 F.2d at 213, emphasized the same artificial distinctions as did the District Court.

Specifically, the Third Circuit maintained the illusory and erroneous view that the HUD Debarment was based solely on the criminal conviction of Michael Facchiano, Jr. and the Corporation, while the Labor Debarment was based upon the conduct underlying those convictions. However, when the debarment proceedings are viewed in transactional terms, an essential and, in fact, striking similarity between the events underlying the claim asserted by the federal government in respective debarment proceedings is revealed. The conduct complained of by the federal government in the Labor Debarment is based upon the same investigation which formed the basis of the claim asserted in the HUD Debarment. Moreover, documents pertaining to both proceedings reveal that they both arose out of the Corporation's participation in HUD-funded contracts from on or about January 1, 1982 to on or about September or October, 1984. Both debarments arose out of the alleged failure of the Corporation to pay prevailing wages in an underpayment of exactly $126,298.27, as well as the violations of other labor standards, and the falsification of certifications to show compliance with payroll and other requirements.

Furthermore, contrary to the conclusions of the Third Circuit, an examination of the appropriate pleadings, evidence and findings of the respective tribunals indicates that the convictions and the underlying conduct were significant factors in both the HUD Debarment and the Labor Debarment. Moreover, the distinction between the

criminal convictions and the conduct underlying the conviction is in fact an artificial distinction. For these and other reasons, the Third Circuit erred in concluding that the same claim was not involved in the HUD Debarment and the Labor Debarment, and that the doctrine of *res judicata* does not prohibit the Labor Debarment.[6]

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[6] The issue of whether the doctrine of collateral estoppel or issue preclusion bars the Labor Debarment was not directly addressed by the Third Circuit and seems to be subsumed in its analysis of the res judicata issue. *See* App. 14; 987 F.2d at 213. In the event that *res judicata* or claim preclusion is inapplicable, Petitioners contend in the alternative that collateral estoppel or issue preclusion prohibits the Labor Debarment. Collateral estoppel bars relitigation of an identical issue already litigated and determined in a prior preceding. *Montana v. United States*, 440 U.S. 147 (1979). In addition, the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Id*; *Cramer v. General Telephone & Electronics Corp.*, 582 F.2d 259 (3d Cir. 1978). As discussed above, under the relevant statutory and regulatory schemes, HUD and Labor are co-extensively charged with the enforcement of the federal labor standards implicated here. The purpose of debarment, whether it is undertaken by HUD or Labor is to effectuate compliance with those labor standards and to promote otherwise the public policies embodied therein. *Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368 (D.C. Cir. 1961); *see also, Janik Paving & Construction, Inc. v. Brock*, 828 F.2d 84 (2d Cir. 1987); 24 C.F.R. § 24.5(a). Therefore, necessarily at the heart of both debarment proceedings was the issue of the appropriate sanction, if any, to effectuate compliance with the federal standards which were allegedly violated. This issue was necessarily litigated and determined in the HUD Debarment where it was held that debarment for 18 months from HUD projects was an appropriate sanction sufficient to effectuate compliance with the federal labor standards involved. Further, Labor (and the Executive Branch) had a full and fair opportunity to litigate the issue in HUD Debarment by virtue of the

II. ALTERNATIVELY, THE THIRD CIRCUIT HAS ERRONEOUSLY DECIDED THE IMPORTANT FEDERAL QUESTION OF THE APPLICABILITY OF RES JUDICATA AND COLLATERAL ESTOPPEL TO DIFFERENT AGENCIES OF THE EXECUTIVE BRANCH OF THE FEDERAL GOVERNMENT, WHICH ISSUE HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Sunshine Coal, supra, is the only case decided by this Court which arguably controls the existence of privity between different agencies of the Executive Branch of the federal government for the purposes of the applicability of preclusion doctrines. However, *Sunshine Coal,* decided in 1940, pre-dates the vast majority of the expansion of the federal government into its current monolithic form. The growth of the federal government since the New Deal, particularly in the post-war period, has resulted in the government's involvement in almost every aspect of American life and business. Therefore, there is an acute need to define when there exists privity between different departments or other agencies of the Executive Branch of federal government for the purposes of applying preclusion doctrines. There is a need for predictability and

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participation of Labor's privy, HUD, which represented the interests of Labor and the Executive Branch. Thus, Labor is precluded by the doctrine of collateral estoppel from relitigating the issue of what constitutes the appropriate sanction to accomplish the enforcement of the federal labor standards at issue and the imposition of an additional debarment is impermissible.

guidance that *Sunshine Coal*, a case decided more than fifty years ago, cannot provide.[7]

For these reasons, there exist special and important reasons for this Court to review the instant case, which provides the opportunity to guide the federal courts and to develop conclusively requirements for the applicability of preclusion doctrines, particularly *res judicata*, relative to the federal government.

III. LABOR'S REGULATIONS DO NOT PERMIT THE DEBARMENT OF INDIVIDUAL OFFICERS OF CORPORATE CONTRACTORS OR SUB-CONTRACTORS.

In holding that the applicable Department of Labor regulation, 29 C.F.R. § 5.12(a)(1), authorizes the debarment of individual officers of corporate contractors, the Third Circuit has fallen prey to the easy temptation of

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[7] *Sunshine Coal* was decided before there was fully developed the distinction between *res judicata* or claim preclusion and collateral estoppel or issue preclusion. *Napier v. Thirty or More Unidentified Federal Agents*, 855 F.2d 1080, 1087, n. 2 (3d Cir. 1988). Furthermore, *Sunshine Coal* is seemingly a collateral estoppel or issue preclusion case and it is unclear whether the privity analysis therein applies to *res judicata*. *Id.*; *see also*, *Headley v. Bacon*, 828 F.2d 1272 (8th Cir. 1987); *Beard v. O'Neal*, 728 F.2d 894 (7th Cir. 1984). In addition, *Sunshine Coal* does not deal at all with the issue of what constitutes the same claim in the unique context of government agencies which may or may not be in privity. Finally, to the extent that collateral estoppel is applicable in the instant case, at the very least this case provides an opportunity for the Court to clarify further the requirements for the applicability of that doctrine to the federal government, in light of present day historical reality.

mindlessly validating agency action while intoning the familiar mantra of "deference". The Third Circuit failed to conduct meaningful judicial review and this case provides an opportunity for the Court to clarify the parameters of a reviewing court's "deference" to agency action.

The Labor Debarment did not involve contracts subject to the Davis-Bacon Act, as amended, 40 U.S.C. § 276a-a5. Instead, the contracts were subject to two Davis-Bacon *Related Acts*, the Housing and Community Development Act of 1974, as amended, 40 U.S.C. §§ 1440(g) and 5310, and the Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. §§ 327-333. Therefore, the Labor Debarment was pursuant to 29 C.F.R. § 5.12(a)(1), which governs the debarment in cases involving contracts subject to the Davis-Bacon Related Acts. By way of comparison, 29 C.F.R. § 5.12(a)(2) is the analogous provision governing debarment relating to contracts governed by the Davis-Bacon Act. These regulations provide:

29 C.F.R. § 5.12(a)(1)

> Whenever any *contractor or subcontractor* is found by the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of any of the [Davis-Bacon Related Acts], such contractor or subcontractor [shall be debarred].

29 C.F.R. § 5.12(a)(2)

> In cases arising under contracts covered by the Davis-Bacon Act, . . . *contractors or subcontractors and their responsible officers*, if any . . . who have been found to have disregarded

> their obligations . . . to employees [shall be debarred].

Thus, 29 C.F.R. § 5.12(a)(2) provides for the debarment of "responsible officers," while 29 C.F.R. § 5.12(a)(1) authorizes only the debarment of a "contractor or subcontractor" in Related Act cases. A corporation or individual which contracts or subcontracts to provide services or materials is a contractor or subcontractor. However, an officer of the contracting organization is not under any definition, in the regulations or otherwise, a contractor or subcontractor. Therefore, and in light of the express provision for the debarment of "responsible officers" in Davis-Bacon Act cases, the debarment of officers is impermissible in Related Act cases. *See United States v. Heller*, 635 F.2d 848, 855 n. 12 (Temp. Emer. Ct. App. 1980) ("[w]here particular language is used in one section but not another, the term or its equivalent should not be implied where excluded"); *Dravo Corp. v. OSHRC*, 613 F.2d 1227, 1242 (3d Cir. 1980) (where a regulation provides for penal sanctions of civil or criminal penalties, "the coverage of an agency regulation should be no broader than what is encompassed within its terms"); *see also, Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); *F.T.C. v. Sun Oil Co.*, 371 U.S. 505 (1963). Therefore, Labor cannot imply the term "responsible officers" in 29 C.F.R.

§ 5.12(a)(1) and the debarment of the individual petitioners is impermissible.[8]

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[8] The Third Circuit attempts to justify the debarment of the individual officers notwithstanding the plain terms of the regulation by pointing to the alleged consistent interpretation by the Department of Labor Wage Appeals Board. App. 16; 987 F.2d at 213-14. The Third Circuit contends that such an allegedly consistent interpretation is entitled to "deference" by the courts. However, in the administrative proceedings, Labor produced no admissible evidence of an official agency interpretation permitting the debarment of officers. (As an appendix to its post-hearing brief, Labor submitted a 1986 letter addressed to an attorney in Bismarck, North Dakota from Assistant Administrator James L. Valin, who also happens to be the debarring official in this case. ALJ Morin did not admit this letter into evidence. He was "unimpressed by [its] reasoning because, *inter alia*, the issue of whether officers could be debarred was a moot point, because they had failed to file a timely objection to their debarment.") In the absence of such an official agency interpretation, the interpretations of those other than agency heads, such as debarring officials, agency counsel and administrative tribunals are entitled to only a "modicum of respect," because such interpretations "plainly [lack] the credentials of a position that agency heads have staked out. . . . " *AFGE v. FLRA*, 840 F.2d 947, 952 (D.C. Cir. 1988); *Caiola v. Carroll*, 851 F.2d 395, 399 (D.C. Cir. 1988). Furthermore, contrary to the Third Circuit's assertions, the fact that an agency claims that salutory purposes would be served by a particular interpretation is not sufficient grounds for upholding an interpretation in conflict with the regulation. *See Cole v. Young*, 351 U.S. 536 (1956); *Dravo Corp., supra*; *L.R. Willson & Sons, Inc. v. Donovan*, 685 F.2d 664, 676 (D.C. Cir. 1982). These and the other grounds set forth by the Third Circuit do not justify ignoring the plain terms of 29 C.F.R. § 5.12(a)(1). *See* App. 14-17; 987 F.2d at 213-214.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted to permit resolution of important issues affecting Petitioners, contractors and other persons aggrieved by multiple proceedings commenced by the government for the same offense and for individuals sought to be debarred by the Department of Labor in the absence of a regulation providing for such debarment.

Respectfully submitted,

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APPENDIX A

Filed March 8, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-3212

FACCHIANO CONSTRUCTION COMPANY, INC.; MICHAEL FACCHIANO, SR.; MICHAEL FACCHIANO, JR.; and JOHN FACCHIANO,

Appellants

v.

THE UNITED STATES DEPARTMENT OF LABOR; THE SECRETARY OF LABOR LYNN MARTIN, in her official capacity; JOHN R. FRASER, ACTING ADMINISTRATOR, WAGE AND HOUR DIVISION, in his official capacity; THE COMPTROLLER GENERAL OF THE UNITED STATES OF AMERICA; ROBERT L. CLARKE, in his official capacity

Appellees

On appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. No. 0315-2 : 91-01670)

Argued November 2, 1992
Before: SLOVITER, *Chief Judge*, STAPLETON
and LAY*, *Circuit Judges*
(Opinion filed: March 8, 1993)

Frederick J. Francis (Argued)
Meyer, Unkovic & Scott
Pittsburgh, PA 15222

Attorney for Appellants,
Facchiano Construction Co.,
Michael Facchiano, Sr.,
Michael Facchiano, Jr.,
John Facchiano

Paul J. Brysh
William J. Stone
Joan Brenner (Argued)
Office of United States Attorney
Pittsburgh, PA 15219

Attorney for Appellees,
United States Department of Labor

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* Honorable Donald P. Lay, Senior Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

OPINION OF THE COURT

LAY, *Senior Circuit Judge.*

Facchiano Construction Company, Inc., Michael Facchiano Jr., Michael Facchiano Sr. and John Facchiano appeal the order of the district court[1] debarring them from contracting with the federal government for three years pursuant to 29 C.F.R. § 5.12(a)(1)(1986). Our review of this matter is plenary. *General Comm. of Adjustment, United Transp. Union v. CSX R.R. Corp.*, 893 F.2d 584, 589 (3d Cir. 1990). We now affirm in part and vacate and remand in part.

I. BACKGROUND

Between 1982 and 1984, Facchiano Construction Company had been paying wages below prevailing standards for work done on HUD contracts in violation of the Housing and Community Development Act of 1974, 42 U.S.C. § 5310 (1988).[2] Following a criminal investigation

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[1] The Honorable Alan N. Bloch, United States District Judge for the Western District of Pennsylvania.

[2] Facchiano Construction Company's certified payrolls showed that employees received a higher wage rate than actually paid (Jt App. 32a; 124a-126a; 201a), that employees were misclassified (Jt App. 201a), that Contract Work Hours and Safety Standards Act (CWHSSA) overtime was underpaid (Jt App. 33a, 133a), that fewer hours were reported than employees had worked (Jt App. 33a), and that the names of certain employees were omitted (Jt App. 33a, 130a). The payrolls had been certified as correct by John Facchiano, the company treasurer.

by the Department of Labor (DOL), Michael Facchiano, Jr., the company secretary, pled guilty to violations of mail fraud or sending falsified payrolls through the mail pursuant to 18 U.S.C. 1341 (1988) and was sentenced to six months imprisonment.[3] The Department of Housing and Urban Development (HUD) then filed an administrative complaint against the Company and Michael Facchiano, Jr. seeking to debar them from participating in HUD funded programs pursuant to 24 C.F.R. § 24.6 (1985). On March 5, 1986, HUD's Board of Contract Appeals ordered the debarment of the Company and Michael Facchiano, Jr. from participation in HUD programs for 18 months. With credit for suspension already served, the debarment period ended November 15, 1986.

While the HUD debarment proceeding was pending, DOL commenced its own proceeding to debar the Company, Michael Facchiano, Sr., Michael Facchiano, Jr. and John Facchiano from contracting with the Federal Government as a whole pursuant to 29 C.F.R. § 5.12(a)(1) (1986). The Facchianos sought injunctive relief in district court to stay the administrative proceedings on the ground that DOL's debarment action was precluded by principles of res judicata and collateral estoppel by reason of the HUD disbarment. The district court granted summary judgment for DOL, holding that res judicata and collateral estoppel did not apply. On appeal, this court reversed the order granting summary judgment on the issue of whether res judicata and collateral estoppel applied to bar DOL's debarment proceeding. *Facchiano v. United States Dep't of Labor*, 859 F.2d 1163, 1167 (3d Cir.

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[3] Fines were also levied against Michael Facchiano Jr. and the Company.

1988), *cert. denied,* 109 S. Ct. 2447 (1989). This court remanded this issue to be determined initially at a DOL administrative hearing. *Id.*

The hearing was held January 18, 1990 before Administrative Law Judge, George P. Morin. The ALJ ruled that res judicata and collateral estoppel did not bar DOL's proceeding, but that only the Company could be debarred, not the individuals. The ALJ ordered that the Company be debarred for 18 months. The Wage Appeals Board reversed the ALJ and ruled that both the Company and the individuals should be debarred for a period of three years.

The Facchianos once again appealed the Board's ruling to the district court. The district court granted summary judgment to DOL finding that the Wage Appeals Board's debarment of the Plaintiffs for three years was within its statutory authority under 29 C.F.R. § 5.12(a)(1). It also upheld the Board's determination that res judicata and collateral estoppel were not applicable. Plaintiffs once again appeal to this court.

II. DISCUSSION

A. *Executive Order No. 12549*[4]

Executive Order No. 12549 provides for government-wide debarment and suspension. On February 18, 1986, President Reagan ordered:

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[4] This issue was not argued in the original briefs, but because of the relevant language of the executive order, this court sought supplemental briefing as to the applicability of the order.

> By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to curb fraud, waste, and abuse in Federal programs, increase agency accountability, and ensure consistency among agency regulations concerning debarment and suspension of participants in Federal programs, it is hereby ordered that:
>
> Section 1.(a) To the extent permitted by law and subject to the limitations in Section 1(c), Executive departments and agencies shall participate in a system for debarment and suspension from programs and activities involving Federal financial and nonfinancial assistance and benefits. *Debarment or suspension of a participant in a program by one agency shall have government-wide effect.*

51 Fed. Reg. 6370 (1986) (emphasis added). In their supplemental brief, plaintiffs assert that because President Reagan issued Executive Order 12549 on February 18, 1986 and HUD's debarment order was issued March 15, 1986, the failure of DOL to give government-wide effect to the HUD debarment precludes DOL from now attempting to impose the same penalty by debarring the Facchianos on a government-wide basis.

We conclude that DOL is not precluded by reason of the Executive Order from debarring the Facchianos from all government contracts. Generally, there is no private right of action to enforce obligations imposed on executive branch officials by executive orders. In *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 236 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976), the Eighth Circuit

held that "Executive Order No. 11821 was intended primarily as a managerial tool for implementing the President's personal economic policies and not as a legal framework enforceable by private civil action." *Id.* The D.C. Circuit has held that executive orders without specific foundation in congressional action are not judicially enforceable in private civil suits. *See In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1357 (D.C. Cir. 1980) (Executive Order No. 11821 and OMB Circular No. A-107 provide no basis for overturning the interim regulations); *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 456-57 (D. C. Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

The purpose of Executive Order No. 12549 is "to curb fraud, waste, and abuse in Federal programs, increase agency accountability, and ensure consistency among agency regulations concerning debarment and suspension. . . . " The Order was intended to be an internal housekeeping measure or "managerial tool" mandating government efficiency. Plaintiffs have not shown that the order was designed for their benefit. *Cf. Independent Meat Packers Ass'n*, 526 F.2d at 236. Thus, we conclude that Executive Order 12549 does not constitute a basis to challenge the DOL government-wide debarment order.

Even if the plaintiffs could challenge DOL's debarment order on the basis of Executive Order No. 12549, we find that the executive order did not become effective until well after DOL had begun its proceedings.[5] It is

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[5] The Department of Labor issued its charging letter, notifying the Facchianos of its intent to seek their debarment from all contracting with the federal government on December 13, 1985.

clear from the language of the executive order that it was not intended to be self-executing, but would be dependent upon the issuance of guidelines by the Office of Management and Budget (OMB) and subsequent implementing regulations by the agencies.[6] OMB issued "Guidelines for Nonprocurement Debarment and Suspension" on May 29, 1987. *See* 52 Fed. Reg. 20360-69 (May 29, 1987). After an extended notice and comment period, twenty-eight agencies published a final common rule on "government wide nonprocurement suspensions and debarment" in May 1988. *See* 53 Fed. Reg. 19160 *et seq* (May 26, 1988). We conclude that the DOL properly continued operating according to its existing regulations

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[6] Section 6 specifically states:

> The Director of the Office of Management and Budget is authorized to issue guidelines to Executive departments and agencies that govern which programs and activities are covered by this Order, prescribe government-wide criteria and government-wide minimum due process procedures, and set forth other related details for the effective administration of the guidelines.

Section 3 states:

> Executive departments and agencies shall issue regulations governing their implementation of this Order that shall be consistent with the guidelines issued under Section 6. Proposed regulations shall be submitted to the Office of Management and Budget for review within four months of the date of the guidelines issued under Section 6. the Director of the Office of Management and Budget may return for reconsideration proposed regulations that the Director believes are inconsistent with the guidelines. Final regulations shall be published within twelve months of the date of the guidelines.

while awaiting from OMB direction that it was governed by the Executive Order and guidance as to government-wide minimum due process procedures.

B. *Res Judicata and Collateral Estoppel*

The Facchianos assert that DOL's debarment order is precluded because DOL and HUD are in "privity" for res judicata purposes. They contend that DOL and HUD, both being Cabinet departments, are subject to direct coordination and control by the President of the United States. By permitting HUD to proceed with the initial debarment, plaintiffs assert that the Executive Branch coordinated the enforcement of federal labor standards pursuant to express terms of the applicable statute and regulatory scheme.[7] Plaintiffs further contend that

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[7] This scheme includes Reorganization Plan No. 14 of 1950, 15 Fed. Reg. 3176 (1950), *amended by* Pub. L. No. 91-258, 84 Stat. 235 (1970), (codified at 5 U.S.C. App. 1988)), which states:

> In order to assure coordination of administration and consistency of enforcement of the labor standards provisions of each of the following Acts by the Federal agencies responsible for the administration thereof, the Secretary of Labor shall prescribe appropriate standards, regulations, and procedures, which shall be observed by these agencies, and cause to be made by the Department of Labor such investigations, with respect to compliance with and enforcement of such labor standards, as he deems desirable. . . .

The purpose of this plan was articulated in the Message of the President, March 13, 1950:

> The methods adopted by the various agencies for the enforcement of labor standards vary widely in character and effectiveness. As a result, uniformity is lack-

because the HUD and DOL debarments "turn on the essential similarity of the underlying events giving rise to the various legal claims," *Davis v. United States Steel Supply Div. of U.S. Steel Corp.*, 688 F.2d 166, 171 (3d Cir. 1982), *cert. denied*, 460 U.S. 1014 (1983), res judicata and collateral estoppel bar DOL's subsequent debarment proceeding.

The Supreme Court addressed the issue of res judicata as applied to governmental parties in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402 (1940). There, the Court held that "there is privity between officers of the same government so that judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government." *Id.* at 402-03. The Court, however, went on to say " [t]he crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent

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ing and the degree of protection afforded workers varies from agency to agency.

In order to correct this situation, this plan authorizes the Secretary of Labor to coordinate the administration of legislation relating to wages and hours on all federally financed or assisted projects by prescribing standards, regulations, and procedures to govern the enforcement activities of the various Federal agencies and by making such investigations as he deems desirable to assure consistent enforcement. The actual performance of enforcement activities, normally including the investigation of complaints of violations, will remain the duty of the respective agencies awarding the contracts or providing the Federal assistance.

Id.

its interests in a final adjudication of the issue in controversy." *Id.* at 403. We are therefore directed to look to the authority Congress delegated to both administrative agencies to bind the government in a final adjudication.

The Department of Housing and Urban Development Act, 42 U.S.C. § 3535(d) authorizes the Secretary of HUD to "make such rules and regulations as may be necessary to carry out his functions, powers, and duties." HUD thereby issued regulations regarding the debarment, suspension, and ineligibility of contractors. *See* 24 C.F.R. § 24 (1985). These regulations define "Debarment" as "exclusion from a participation from *HUD* programs for a reasonable, specified period of time. . . . " 24 C.F.R. § 24.4(a) (1985) (emphasis added). Moreover, the regulations state:

> Debarment, suspension, placement in an ineligible status, temporary denial of participation and conditional participation are measures which may be invoked by offices of the Department either to exclude or to disqualify contractors and grantees from participation in Department programs. These measures shall be used for the purpose of protecting the public and are not for punitive purposes. 24 C.F.R. § 24.5(a) (1985).

The plain language of the statute and regulatory scheme limits HUD's debarment authority to participation in HUD programs. At the time of its proceeding, HUD had no authority to debar participation from other federal contracting programs.[8] In addition, HUD had no authority to debar for labor standards violations. Causes for

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[8] As noted above, Executive Order No. 12549 did not become effective until OMB had issued guidelines and the agen-

debarment from HUD contracts include conviction for criminal offenses incident to obtaining the contract, conviction under Federal Antitrust statutes, and violation of contract provisions. *See* 24 C.F.R. § 24.6 (1985). Nowhere is HUD authorized to enforce the Davis-Bacon Act[9] or Related Acts[10] labor violations.

The Department of Labor, on the other hand, has broad delegated authority to debar contractors and subcontractors from all federal contracts for labor standards violations. Pursuant to 40 U.S.C. § 276a, the Secretary of Labor has promulgated 29 C.F.R. § 5.12(a)(1) (1986) which states:

> Whenever any contractor or subcontractor is found by the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions . . . such contractor or subcontractor . . . shall be ineligible for a period not to exceed three years . . . to receive any contracts or subcontracts subject to any of the statutes listed in § 5.1.

We find that because the scope of HUD's enforcement authority is limited to HUD programs, HUD, even though it acted as a representative of the United States,

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cies had promulgated implementing regulations. HUD incorporated Executive Order No. 12549 by reference in May of 1988. Thus, the regulations applicable to the Facchianos were those in effect in 1985 and 1986.

[9] 40 U.S.C. §§ 276a-276c (1988).

[10] The Housing and Community Development Act of 1974, as amended, 42 U.S.C. §§ 1440(g), 5310 (1988); Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. §§ 327-333 (1988).

did not have "authority to represent [the United States'] interests in a final adjudication of the issue in controversy." *Sunshine Coal*, 310 U.S. at 403. Reorganization Plan No. 14, while permitting HUD to enforce the labor standards with regard to its programs, in no way precluded the Secretary of Labor from government-wide enforcement of labor standards pursuant to 29 C.F.R. § 5.12(a)(1).

Moreover, we do not find that DOL's and HUD's causes of action are the same for res judicata effect, nor were the issues identical for collateral estoppel effect. The test for whether there is a single cause of action is: (1) whether the acts and the demand for relief are the same (2) whether the theory of recovery is the same, (3) whether the witnesses and documents necessary at trial are the same, and (4) whether the material facts alleged are the same. *United States v. Athalone* [sic] *Indus.*, 746 F.2d 977 (3d Cir. 1984).

Here, the HUD debarment was based solely on the criminal conviction of Michael Facchiano, Jr. for mail fraud, which was a violation of HUD regulations. DOL, on the other hand, was concerned with Michael Facchiano, Sr., John Facchiano, as well as Michael Facchiano, Jr. and their alleged willful and aggravated violations of the labor standards requirements – albeit on a HUD-related project. Not only are the parties different, but the two violations do not constitute the same cause of action. Although the HUD violation involved the same underlying wrongful conduct, the two debarment proceedings arose from different statutes and different evidence. What was material to the HUD proceeding was the criminal conviction and mitigating factors that would demonstrate the Company was now a "responsible" party that could

again be entrusted with HUD contracts. The facts material to the DOL proceeding were actual evidence of the violations, the extent and nature of the misclassification and underpayments, evidence of previous violations and falsification of the certified payrolls. Finally, the demand for recovery in each of these proceedings was different. DOL demanded a three year, government-wide debarment for willful and aggravated violations of Davis-Bacon Related Acts. HUD demanded a debarment from HUD programs only, for a period up to three years.

Based on these considerations, we hold that res judicata and collateral estoppel do not bar DOL's debarment proceeding.

C. *The Debarment of Individuals Under § 512(a)(1)* [sic]

Plaintiffs assert that the district court erred in concluding that 29 C.F.R. § 5.12(a)(1) authorized the debarment of Michael Facchiano, Sr., Michael Facchiano, Jr. and John Facchiano. They argue that 29 C.F.R. § 5.12(a)(1) only authorizes the debarment of the Facchiano Company, not its individual corporate officers.

29 C.F.R. § 512(a)(1) (1986) states:

> Whenever any contractor or subcontractor is found by the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of any of the applicable statutes listed in § 5.1 other than the Davis-Bacon Act, such *contractor or subcontractor* or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to

> exceed 3 years . . . to receive any contracts or subcontracts subject to any of the statutes listed in § 5.1.

(emphasis added). Plaintiffs argue that the plain language of this regulation provides only for debarment of the contractor or subcontractor, not the individual corporate officers. They assert that if DOL intended § 5.12(a)(1) to include individuals, it would have said so as it clearly did in § 5.12(a)(2).[11]

Although an agency is bound by the express terms of its regulations until it rescinds or changes them, *see United States v. Nixon*, 418 U.S. 683 (1974), we find no error in DOL's interpretation that § 5.12(a)(1) includes debarment of individual responsible officers. Courts must accord substantial deference to an agency's "construction

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[11] Plaintiffs point out that § 5.12(a)(2), the regulation dealing with the Davis-Bacon Act cases, specifically includes debarment of individuals as well as the corporate entity. It provides:

> In cases arising under contracts covered by the Davis-Bacon Act, the Administrator shall transmit to the Comptroller General the names of the contractors or subcontractors *and their responsible officers*, if any (and any firms in which the contractors or subcontractors are known to have an interest), who have been found to have disregarded their obligations to employees, and the recommendations of the Secretary of Labor or authorized representative regarding debarment. The Comptroller General will distribute a list to all Federal agencies giving the names of such ineligible person or firms, who shall be ineligible to be awarded any contract or subcontract of the United States or the District of Columbia any contact [sic] or subcontract subject to the labor standards provisions of the statutes listed in § 5.1 (emphasis added).

of a statutory scheme it is entrusted to administer." *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). Moreover, an administrative agency's interpretation of its own regulation receives even greater deference than that accorded to its interpretation of a statute. *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

The Wage Appeals Board has consistently interpreted subsection 5.12(a)(1) to include "responsible officers" and routinely debars individual corporate officers in Related Acts cases. *See, e.g., R.J. Sands, Inc. v. Raymond J. Sanders, President*, WAB case No. 90-25 (January 31, 1991); *Janik Paving & Constr., Inc. v. Brock*, 828 F.2d 84 (2d Cir. 1987). We find such interpretation to be reasonable in furthering the remedial goals of the Davis-Bacon Act and Related Acts. Both § 5.12(a)(1) and § 5.12(a)(2) are designed to ensure the cooperation of the employer, largely through self-enforcement, in complying with the Davis-Bacon Act and Related Act requirements. Debarment may in fact "be the only realistic means of deterring contractors from engaging in willful [labor] violations based on a cold weighing of the costs and benefits of non-compliance." *Janik Paving & Constr., Inc.*, 828 F.2d at 91. In furthering the purpose of the Davis-Bacon Act and Related Acts, we can discern no rational reason for including debarment of responsible officers in one regulation, but not the other and thus defer to the Board's consistent interpretation that both regulations allow debarment of responsible officers.[12]

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[12] A contrary interpretation of these regulations that would exclude responsible officers from debarment may in fact render

Plaintiffs emphasize the fact that § 5.12(a)(1) omits the words "responsible officers," while § 5.12(a)(2) specifically includes them. Nothing can be inferred from differences in language of the two regulations because they were not drafted at the same time. So long as the agency's interpretation of the regulation is reasonable, it is entitled to deference. *Udall*, 380 U.S. at 16. "The ultimate criterion is the administrative interpretation [of an administrative regulation], which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 16-17 (citing *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14). We therefore affirm the Board's determination that the individual corporate officers were subject to debarment under 29 C.F.R. § 5.12(a)(1).

D. *The Debarment of Michael Facchiano Sr.*

Michael Facchiano, Sr. argues that the district court erred in concluding that he could be debarred for willful and aggravated violations of the Davis-Bacon Related Acts solely on the basis of his status as President of the Company. We agree and reverse as to the debarment of Michael Facchiano, Sr.

The Wage Appeals Board debarred Michael Facchiano, Sr. because "Board precedent did not allow a responsible company official to avoid debarment by claiming that the labor standards violations were committed by agents or employees of the firm." WAB Case No.

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the regulations ineffective if an offending corporate officer is allowed to create new businesses or continue to bid through other preexisting businesses in order to avoid debarment.

91-06 (Aug. 29, 1991).[13] We hold that such precedent is contrary to law in that it incorrectly imposes strict liability on corporate officers for labor standards violations. Unlike cases under the Federal Food and Drug Act, where Congress dispensed with a "consciousness of wrongdoing" or scienter element and therefore failure to act was deemed to be a sufficient basis for a responsible corporate agent's liability, *see United States v. Park*, 421 U.S. 658, 671 (1974), labor standards statutes that include the term "willful" have been interpreted to require knowledge on the part of the corporate officer. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1987) (the word "willful" in the FLSA means conduct that is "voluntary," "deliberate" or "intentional" and not merely negligent); *See also Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190, 196 (5th Cir. 1983) (the test for "willfulness" under the Portal-to-Portal Act of 1947, as amended, 29 U.S.C. § 255(a) is whether "there is substantial evidence in the record to support a finding that the employer knew or suspected that his actions might violate the FLSA"). Indeed, we know of "no precedent for failing to give effect to a knowledge requirement that Congress has expressly included in a criminal statute." *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 52 (1st Cir. 1991). DOL's regulation 29 C.F.R. § 5.12(a)(1) specifically requires the labor standard violation to be "willful or aggravated" and thus Michael Facciano, Sr. cannot be

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[13] The Board cited *Marc S. Harris, Inc.*, WAB Case No. 88-40 (Mar. 28, 1991) at p. 4 and the cases cited therein as the precedent it was bound to follow.

held liable absent substantial evidence that he knew of the violations.

Although there is some evidence in the record that Michael Facchiano, Sr. did know about the labor standards violations, the Wage Appeals Board never made such a finding. On appeal, DOL points to evidence that Michael Facchiano, Sr. was present and assumed an active role in the day to day operation of the business in order to prove that he knew of the labor standards violations. However, "the courts may not accept appellate counsel's *post-hoc* rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself. *Id.* (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981)).

We find that the Wage Appeals Board's articulated basis for debarring Michael Facchiano, Sr. is contrary to law. Because a reviewing court cannot affirm an agency decision based on improper grounds, *see SEC v. Chenery Corp.*, 332 U.S. at 196-97, the district court's approval of the Board's debarment cannot stand.

Accordingly, the judgment of the district court affirming the debarment of Michael Facchiano, Sr. is vacated, and we remand to the district court with directions that the case be remanded to the Wage Appeals Board for a determination as to whether Michael Facchiano, Sr. had the requisite knowledge for a "willful or aggravated" violation. In all other respects, the judgment of the district court is affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FACCHIANO CONSTRUCTION COMPANY, INC., MICHAEL FACCHIANO, SR., MICHAEL FACCHIANO, JR., and JOHN FACCHIANO,	)	Civil Action No. 91-1670
Plaintiffs	)	
vs	)	
THE UNITED STATES DEPARTMENT OF LABOR; THE SECRETARY OF LABOR, LYNN MARTIN, in her official capacity; JOHN R. FRASER, ACTING ADMINISTRATOR, WAGE AND HOUR DIVISION, in his official capacity, and THE COMPTROLLER GENERAL OF THE UNITED STATES OF AMERICA, ROBERT L. CLARKE, and in his official capacity,	)	
Defendants	)	

REPORT AND RECOMMENDATION

I. Recommendation:

It is respectfully recommended that the defendants' motion for summary judgment (Docket No. 11) should be granted, and that the plaintiffs' motion for summary judgment (Docket No. 17) should be denied.

II. Report:

Presently before the Court for disposition are cross motions for summary judgment.

The plaintiffs, Facchiano Construction Company, Inc. ("the Company"), Michael Facchiano, Sr., Michael Facchiano, Jr., and John Facchiano, commenced this action seeking to enjoin the United States Department of Labor ("DOL") and its agencies from debarring the plaintiffs from receiving future government contracts and subcontracts[1] and to reverse the decision of the Wage Appeals Board of the DOL.[2]

The parties have stipulated to these facts[3]: The Company is a corporation engaged in the operation of a concrete constructing business, and Michael Facchiano Sr., Michael Facchiano, Jr., and John Facchiano are officers of the Company. During the period between 1982 and 1984, the Company was engaged in construction projects which were partially funded by the United States Department of Housing and Urban Development ("HUD"). During the summer of 1984, the DOL conducted an investigation of the Company's performance on certain construction projects and determined that the Company

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[1] We note that on November 7, 1990, the Court denied both of the plaintiffs' applications for a temporary restraining order.

[2] In a decision dated August 29, 1991, the Wage Appeals Board ordered that the plaintiffs were ineligible to receive any contracts or subcontracts subject to any of the statutes listed in 29 C.F.R. § 5.1 for a period of three years.

[3] The parties' stipulation was admitted into evidence during an administrative hearing held on January 18, 1990.

had been paying its employees less than the prevailing wage rates for the classifications of work they performed and for the hours they worked based upon local area collective bargaining agreements. The investigation also revealed that the Company had falsified its payroll records to show that it paid higher wage rates than it actually paid. As a result of the investigation, a criminal information was filed in this Court, and Michael Facchiano, Jr. and the Company pled guilty to two counts of mail fraud. On February 22, 1985, Michael Facchiano, Jr. was sentenced to six months in prison, and fines were levied against both him and the Company. The Company also paid back wages that were due to its employees.

Thereafter, HUD filed an administrative complaint against Michael Facchiano, Jr. and the Company seeking to debar them from participating in HUD funded programs. After reviewing briefs and documentary evidence submitted by the parties, HUD's Board of Contract Appeals issued a determination and order dated March 15, 1986 which ordered the debarment of the Company and Michael Facchiano, Jr. from participation in HUD programs for eighteen (18) months. No party appealed from this determination.

While the HUD debarment was pending, the DOL commenced a debarment proceeding against the plaintiffs seeking to debar them from contracting with the federal government. At the plaintiffs' request, the DOL referred the matter of their proposed debarment to an Administrative Law Judge for a hearing. Thereafter, Michael Facchiano, Jr., John Facchiano, and the Company ("respondents") brought an injunction action in this

Court[4], moving to stay the administrative proceedings on grounds that the DOL's debarment action was barred by the doctrines of res judicata and collateral estoppel. Ultimately, the parties entered into a stipulation of facts and filed cross motions for summary judgment.

In a Report and Recommendation dated December 16, 1987, it was recommended that DOL's motion for summary judgment be granted. This recommendation was adopted as the opinion of the Court by Order dated February 16, 1988, wherein the Court affirmed that the doctrines of res judicata and collateral estoppel did not apply to bar the DOL's proceeding.

The respondents appealed to the United States Court of Appeals for the Third Circuit, and that Court affirmed the grant of summary judgment against the respondents as to their claim for injunctive relief, but it reversed the order granting DOL's motion on the ground that the issue of whether claim preclusion applied to bar the DOL's proceeding was to be determined at the administrative hearing.

The record shows that an administrative hearing was held on January 18, 1990 before Administrative Law Judge ("ALJ") George P. Morin. On September 27, 1990, ALJ Morin ruled that the doctrines of res judicata and/or collateral estoppel did not bar the DOL's debarment proceeding; that only the Company could be debarred, and not the individual respondents; and that the Company was to be debarred for a period of eighteen (18) months. Thereafter, the DOL and the Company sought review of

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[4] The action was docketed at C.A. 86-2711.

the ALJ's decision and filed petitions for review to the Wage Appeals Board. On August 29, 1991, the Wage Appeals Board issued its decision, ruling that both the Company and the individual respondents should be debarred for a period of three (3) years.

The plaintiffs then commenced this action and invoke the Court's jurisdiction pursuant to Section 706 of the Administrative Procedure Act, 5 U.S.C. § 551, et seq., and 28 U.S.C. §§ 1331, 1346, and 1361.

The plaintiffs contend that the decision of the Wage Appeals Board was contrary to law, and that summary judgment should be entered in their favor. They seek an order requiring the defendants to remove their names from the list of ineligible bidders to future government contracts and subcontracts. The defendants argue that the decision of the Wage Appeals Board had a rational basis and was supported by a preponderance of the evidence. Both parties have moved for summary judgment.

The debarment decision of the Wage Appeals Board is subject to judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701. See, *Shane Meat Co. v. United States Dept. of Defence*, 800 F.2d 334, 336 (3d Cir. 1986). Although the plaintiffs suggest that a *de novo* review is appropriate, *de novo* review is warranted only where judicial proceedings are brought to enforce certain administrative actions, or where there are inadequate factfinding procedures in an adjudicatory proceeding. *Camp v. Pitts*, 411 U.S. 138, 142 (1973), citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

Neither of those situations applies here.[5] Thus, our review is limited to ascertaining whether the agency action was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law". 5 U.S.C. § 706(2)(A).

This standard of review is clearly a narrow one. *Citizens to Preserve Overton Park*, 401 U.S. at 416. A court is not empowered to substitute its judgment for that of the agency, *Id.*, and should not set aside an agency action as arbitrary and capricious if it is rational, based on relevant factors, and within the agency's statutory authority. *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual*, 463 U.S. 29, 42 (1983).

Here, it appears that the decision of the Wage Appeals Board to debar the plaintiffs for three years was within their statutory authority. In 29 C.F.R. Part 5, as amended, it is provided in pertinent part:

> § 5.12 *Debarment proceedings*
>
> (a)(1) Whenever any contractor or subcontractor is found by the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of any of the applicable statutes listed in § 5.1 other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed 3 years (from the date of

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[5] The plaintiffs did not bring this action to enforce the decision of the Wage Appeals Board, and the record fails to show that the factfinding procedures in the administrative hearing before ALJ Morin were inadequate.

> publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list as provided below) to receive any contracts or subcontracts subject to any of the statutes listed in § 5.1.

The plaintiffs were deemed to have committed willful and aggravated violations of both the Housing and Community Development Act of 1974, as amended, 42 U.S.C. §§ 5310, 1440(g), and the Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. § 327, et seq., both of which are listed in § 5.1 of the regulations. Thus, as the decision to debar the plaintiffs for three years was within the Wage Appeals Board's statutory authority, its decision will not be set aside if it is rational and based on relevant factors.

The plaintiffs argue that the action of the Wage Appeals Board was arbitrary and capricious for the following reasons: (1) the applicable regulation, 29 C.F.R. § 5.12(a)(1), does not permit the debarment of individual officers; (2) imposition of the three year debarment as to Michael Facchiano, Jr. and the Company amounts to a four and one-half year debarment, since they have already been debarred for a period of eighteen months from performing government contracts; (3) imposition of a three year debarment cannot stand, as the doctrines of res judicata and collateral estoppel apply to HUD's determination that an eighteen month period of debarment was appropriate; and (4) the agency failed to consider mitigating or extenuating circumstances as to Michael Facchiano, Sr. in imposing its sanctions.

In support of its decision to debar the individual plaintiffs pursuant to § 5.12(a)(1), the Wage Appeals

Board relied on other sections of the regulations, specifically, 29 C.F.R. § 5.12(b)(1), which describes the parties to be afforded hearings on debarment issues.[6] Section 5.12(b)(1) provides in relevant part:

> [W]henever as a result of an investigation . . . the Administrator finds reasonable cause to believe that a contractor or subcontractor has committed willful or aggravated violations of the labor standards provisions . . . the Administrator shall notify . . . *the contractor or subcontractor and its responsible officers*, if any (and any firms in which the contractor or subcontractor are known to have a substantial interest), of the finding. The Administrator shall afford such *contractor or subcontractor and any other parties notified* an opportunity for a hearing as to whether debarment action should be taken under paragraph (a)(1) of this section . . . (emphasis added).

The agency also reasoned that its action was in furtherance of the policy underlying the DOL's debarment regulation, which is "to effectuate compliance and further the public policy represented by the labor acts".[7] Moreover, the agency relied on its precedent which permits the debarment of responsible officers for violations which are deemed willful or aggravated.[8] Since judicial deference must be accorded to an agency action which is consistent with its past regulatory interpretations, see, *United States*

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[6] See, Decision of the Wage Appeals Board at pp. 8-9.

[7] Id. at p. 10.

[8] Id.

v. Clark, 454 U.S. 555, 561-62 (1982), the decision to debar the individual plaintiffs was not arbitrary or capricious.

As set forth above, § 5.12(a)(1) provides for a debarment period "not to exceed three years" for "aggravated or willful violations". Here, the agency justified its imposition of a three year debarment because the DOL's investigation of the Company revealed that it submitted falsified certified payrolls; that under Wage Appeals Board precedent, falsification of certified payrolls is "aggravated or willful" misconduct; and that such violations warrant a three year debarment period absent extraordinary circumstances.[9] The agency determined that no extraordinary circumstances existed here.

As to the plaintiffs' assertion that such ruling amounts to a debarment of four and one-half years as to the Company and Michael Facchiano, Jr. due to their previous HUD debarment, the agency ruled that the HUD sanction did not effectively debar the Facchiano family business and its principles from seeking or receiving HUD contracts.[10] According to the agency, "the Facchiano family business simply switched its active operations to a sole proprietorship [and] continued to seek and obtain HUD contracts".[11] That finding is supported by the evidence submitted during the hearing before ALJ Morin. Such evidence shows that during the HUD debarment

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[9] Id. at pp. 10-11.

[10] Id. at p. 11.

[11] Id. at pp. 7-8.

period, the Company's assets and employees were utilized by Michael Facchiano Contracting, a sole proprietorship owned by Michael Facchiano, Sr.[12]; that during HUD's debarment period, this entity continued to bid on and receive HUD contracts[13]; and that Michael Facchiano, Jr. continued to be active in the family business after his HUD suspension.[14] Since the agency based its ruling on these findings, we cannot say that its decision was arbitrary or capricious.

The agency also found that the doctrines of res judicata and collateral estoppel did not apply to bar its action. Res judicata precludes the relitigation of matters based on the same cause of action that were or could have been raised and resolved in a prior proceeding. *Napier v. Thirty Or Motre* [sic] *Unidentified Fed. Agents,* 855 F.2d 1080, 1086 (3d Cir. 1988).[15] The claim preclusive aspect of res judicata requires a showing that there has been: (1) a final judgment on the merits; (2) a prior suit involving the same parties or their privies; and (3) a subsequent suit based on the same cause of action. *Napier,* 855 F.2d at 1086 (citation omitted). Insofar as res judicata is applied to governmental entities, the Supreme Court has stated:

> [t]here is privity between officers of the same government so that a judgment in a suit

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[12] See transcript of hearing held before ALJ Morin at pp. 115-116 and 125-129.

[13] Id. at pp. 77-78.

[14] Id. at p. 92.

[15] The related doctrine of collateral estoppel treats as final only those questions actually and necessarily decided in a prior suit. *Brown v. Felsen,* 442 U.S. 127, 139 n.10 (1979).

> between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government. [citation omitted] The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy.

Sunshine Coal Co. v. Adkins, 310 U.S. 381, 402-403 (1940).

The agency ruled that res judicata did not apply to its debarment action since, under the regulatory scheme at issue, it and not HUD has primary responsibility for determining whether government-wide debarment is warranted.[16] In support of its position, the agency relied on Reorganization Plan No. 14 of 1950, 5 U.S.C App.1, which confers authority unto the Secretary of Labor to prescribe appropriate standards, regulations and procedures for ensuring compliance with and enforcement of the labor standards violations at issue. See, 29 C.F.R. § 5.1(a).

The agency also found that res judicata and collateral estoppel were inapplicable here, as its proceeding and HUD's proceeding did not involve the same cause of action. According to the agency, "(1) the HUD debarment applied to HUD projects only, whereas debarment by the Department of Labor would have government-wide effect; and (2) the focal point of the HUD debarment was the criminal conviction of Facchiano Construction and Michael Facchiano, Jr., whereas debarment by the Department of Labor would be based on the labor standards

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[16] See, Decision of the Wage Appeals Board at p. 7.

violations themselves."[17] The ruling of the agency in this regard was not arbitrary, capricious, or contrary to law.

Likewise, the determination that the matter should not be remanded to ALJ Morin for findings on mitigating factors applicable to Michael Facchiano, Sr. does not appear to be arbitrary or capricious. The agency reasoned that its sanction as to Michael Facchiano, Sr. was warranted since "Board precedent does not allow a responsible company official to avoid debarment by claiming that the labor standards violations were committed by agents or employees of the firm." (citation omitted).[18]

Therefore, for the reasons set forth above, it is recommended that the defendants' motion for summary judgment (Docket No. 11) should be granted, and that the plaintiffs' motion for summary judgment (Docket No. 17) should be denied.

Respectfully submitted,

/s/ Robert C. Mitchell
Robert C. Mitchell
United States
Magistrate Judge

Dated: March 3, 1992

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[17] Id.

[18] Id. at p. 11.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FACCHIANO CONSTRUCTION CO., INC., MICHAEL FACCHIANO, SR., MICHAEL FACCHIANO, JR., and JOHN FACCHIANO,	)	Civil Action No. 91-1670
Plaintiffs	)	
v.	)	
THE UNITED STATES DEPT. OF LABOR, et al.,	)	
Defendants	)	

ORDER

AND NOW, this 23rd day of March, 1992, after the plaintiffs filed an action in the above-captioned case, and after both parties filed cross motions for summary judgment, and after a Report and Recommendation was filed by the United States Magistrate Judge, and the parties were granted ten days in which to file objections thereto, and upon consideration of the objections filed by the plaintiffs, and upon independent review of the pleadings, and the Magistrate Judge's Report and Recommendation, which is adopted as the opinion of this Court,

IT IS ORDERED that the defendants' motion for summary judgment (Docket No. 11) is granted, and that the

plaintiff's motion for summary judgment (Docket No. 17) is denied.

/s/ Alan N. Bloch
United States District Judge

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Assistant U.S. Attorney

Honorable Robert C. Mitchell
United States Magistrate Judge

APPENDIX D

WAGE APPEALS BOARD

UNITED STATES DEPARTMENT OF LABOR

WASHINGTON, D.C.

In the Matter of:

FACCHIANO CONSTRUCTION COMPANY, INC., a/k/a MICHAEL FACCHIANO CONCRETE CONSTRUCTION COMPANY,
Contractor

MICHAEL FACCHIANO, SR.,
Owner

MICHAEL FACCHIANO, JR.,
Owner

JOHN FACCHIANO,
Owner

WAB Case No. 91-06

BEFORE: Charles E. Shearer, Jr., Chairman
Ruth E. Peters, Member
Stuart Rothman, Senior Member

DATED: August 29, 1991

DECISION OF THE WAGE APPEALS BOARD

This case is before the Wage Appeals Board on the petitions of the Acting Administrator of the Wage and Hour Division and of Facchiano Construction Company, Inc. ("Facchiano Construction") for review of the September 27, 1990 decision and order (Attachment) of Administrative Law Judge ("ALJ") George P. Morin on debarment issues. The Acting Administrator petitions for review of

the ALJ's determination that the Facchiano firm should be debarred for 18 months rather than for the full three-year debarment period provided for in 29 C.F.R. 5.12(a)(1); the Acting Administrator also seeks review of the ALJ's determination that corporate officers Michael Facchiano, Sr., Michael Facchiano, Jr. and John Facchiano (collectively, "the Facchianos") should not be debarred. The Facchiano firm requests review of the ALJ's rulings on Facchiano Construction's claim preclusion defenses, and requests reversal of the ALJ's order debarring the firm. For the reasons stated below, the Board denies Facchiano Construction's petition for review, grants the Acting Administrator's petition, and orders that Facchiano Construction and the Facchianos be debarred for three years.

I. BACKGROUND

Facchiano Construction is a Pennsylvania corporation, primarily engaged in operation of a concrete contracting business in Pittsburgh, Pennsylvania. The corporate officers of Facchiano Construction are Michael Facchiano, Sr., president; and his two sons Michael Facchiano, Jr., secretary, and John Facchiano, treasurer.

At the time that Michael Facchiano, Jr. joined the family business on a fulltime basis after completing his education, the annual gross revenue was $400,000 to $500,000, all but about 20% of which came from residential concrete work. Michael Facchiano, Jr. embarked on an effort to increase the amount of the business' commercial work. A principal element of this effort was bidding on federally funded or assisted projects. From 1982 to 1984,

70 to 75% of the annual revenues of from $1 million to $1.5 million came from federal projects. (ALJ's Decision ("ALJD") at 8).

In the period prior to 1984, the business was the subject of three investigations for Davis-Bacon violations involving travel time, failure to pay overtime and misclassification of workers; the investigation results required restitution of approximately $2,800, $400 and $45, respectively (ALJD at 9). Despite these investigations, the ALJ stated (*Id.*), Michael Facchiano, Jr.

> embarked on a scheme to increase the company's revenue and thereby enhance his business stature in the eyes of his father. This involved the deliberate misclassification of employees, payment of less than prevailing wages required in the federally funded contracts and the failure to pay overtime. . . . The witness testified that other contractors were doing the same thing and he felt it was necessary for his father's company to follow suit in order to occasionally be the low bidder on the numerous contracts they bid on, and to grow as a company.

Several contracts were awarded to Facchiano Construction between January 1, 1982, and September 30, 1984. All the contracts were funded in whole or in part through community development block grants administered by the Department of Housing and Urban Development ("HUD"). The contracts were subject to the labor standards provisions of the Housing and Community Development Act of 1974, as amended (42 U.S.C. §§ 5310, 1440(g)) ("HCDA") (a Davis-Bacon Related Act).

In 1984 the Inspector General's Office of the Department of Labor, in conjunction with the Federal Bureau of Investigation, investigated Facchiano Construction's performance under the contracts. The investigation disclosed that, in some instances, Facchiano Construction had failed to pay the applicable prevailing wage rates. The investigation also disclosed that the firm had submitted falsified certified payroll records, which showed higher wage rages than the rates that were actually paid. The payrolls were certified as correct and complete by Michael Facchiano, Jr., or John Facchiano. As a result of the investigation, Facchiano Construction paid $128,298.27 to 20 employees – the amount due to the employees as prevailing wages and fringe benefits.

As a further result of the investigation, a two-count criminal information was filed against the firm and Michael Facchiano, Jr., the corporation's secretary, charging them with mail fraud in violation of 18 U.S.C. § 1341, for sending falsified certified payrolls through the mail. Both defendants pleaded guilty to the charges. On February 22, 1985, Michael Facchiano was sentenced to six months in prison, fined $2,000 and placed on probation for five years. Facchiano Construction also was fined $2,000. The fines were paid, and Michael Facchiano, Jr. served the six-month prison sentence.

On May 15, 1985, HUD notified Michael Facchiano, Jr. and Facchiano Construction that it was considering debarring them from further participation in HUD programs for a three-year period pursuant to 24 C.F.R. 24.6(a)(9), and that they were temporarily suspended from participation in HUD programs pending a final decision on debarment. Briefs and documentary evidence

were submitted by the parties to the HUD proceeding. On March 5, 1986, HUD's Board of Contract Appeals debarred Facchiano Construction and Michael Facchiano, Jr. from participation in HUD programs for 18 months. With credit given for the period of suspension while the debarment proceedings were pending, they were debarred until November 15, 1986.

When the suspension took effect, Michael Facchiano, Jr. resigned his position as an officer of the corporation and ceased all managerial duties. He went to work for his father's business (Michael Facchiano Contracting), essentially as foreman. (ALJD at 9). At the time of the hearing before the Department of Labor ALJ, Facchiano Construction was still in existence but was inactive, and had not taken on any work since the investigation began and Michael Facchiano, Jr. resigned his position in the corporation (*Id.* at 10). The only active business is the sole proprietorship, Michael Facchiano Contracting. Michael Facchiano, Sr. owns the business and equipment; he also owned the equipment from 1982 to 1984, when the corporation was the active business entity. Generally, the same employees who worked for the corporation are employed by the sole proprietorship. Michael Facchiano, Jr. testified that he was employed as a superintendent by the proprietorship, and is also involved in the bidding process, purchase of equipment, employee relations and general office procedures. John Facchiano is also involved in bidding. Michael Facchiano, Jr. further testified that the gross volume of the business was about $4 million 1987, $5.5 million in 1988, and $5 to $5.5 million in 1989. (*Id.*).

On December 13, 1985, while the HUD matter was pending, the Acting Administrator of the Wage and Hour

Division notified Facchiano Construction; Michael Facchiano, Sr.; Michael Facchiano, Jr.; and John Facchiano of the Department of Labor's intention to seek their debarment from all contracting with the Federal government for three years, pursuant to 29 C.F.R. 5.12(a)(1), for aggravated and willful Related Acts violations. On October 27, 1986, the matter was referred to the Office of Administrative Law Judges for a hearing. The Order of Reference alleged that Facchiano Construction and the Facchianos had committed aggravated and willful violations of the HCDA and the Contract Work Hours and Safety Standards Act, as amended (40 U.S.C. § 327 *et seq.*) ("CWHSSA").

On February 12, 1987 Facchiano Construction and the Facchianos (with the exception of Michael Facchiano, Sr.) filed an injunctive action in the United States District Court for the Western District of Pennsylvania, seeking to stay the administrative proceedings on the ground that the debarment action was barred by the doctrines of res judicata and collateral estoppel. The parties entered into a stipulation of facts and filed cross-motions for summary judgment. A U.S. magistrate made findings in favor of the Department of Labor on the res judicata and collateral estoppel issues, and those findings were affirmed by a district court judge, who entered an order granting the Department's summary judgment motion. *Facchiano v. United States Dep't of Labor,* 108 Lab. Cas. (CCH) ¶ 35,071 (W.D. Pa. 1987). On appeal, the Third Circuit affirmed the district court's denial of the request of the Facchianos and Facchiano Construction for injunctive relief, but remanded the claim preclusion issue for determination in the administrative proceedings. *Facchiano v. United States*

Dep't of Labor, 859 F.2d 1163 (3d Cir. 1988), cert. denied, 490 U.S. 1097 (1989).

II. THE ALJ'S DECISION AND ORDER

A. *Claim Preclusion*

On the res judicata and collateral estoppel question, the ALJ noted that the magistrate and district court had found determinative (1) the fact that the debarment by HUD extended to HUD projects only, while debarment by the Department of Labor would have government-wide effect; and (2) that the HUD debarment was based on the criminal conviction, while debarment by the Department of Labor would be based on the Davis-Bacon violations themselves (ALJD at 13). The ALJ stated that he agreed with the magistrate and the district court that these factors "sufficiently distinguish the proceedings to defeat the res judicata and collateral estoppel defences." (*Id.*).

B. *Debarment of the Facchianos*

The ALJ stated that the Facchianos "appear resigned to entry of an order debarring Facchiano Construction Company, Inc., as well they might, in view of the fact that such an order would have little if any effect on the family's operation, given the inactive status of the corporation and the robust growth of Michael Facchiano Contracting since the era of the criminal proceedings and the HUD debarment action" (ALJD at 13). The ALJ acknowledged that "to be of any real effect in insuring future compliance with the requirements of the Acts and regulations governing their federal contract work, a debarment

would have to be directed against Michael Facchiano and his two sons" (*Id.*). However, the ALJ accepted the Facchianos' argument that 29 C.F.R. 5.12(a)(1), which provides for debarment for "aggravated or willful" Related Acts violations, provides only for debarment of a "contractor or subcontractor" and not for debarment of individual corporate officers. Accordingly, the ALJ determined that a debarment order should be directed against only the corporation – Facchiano Construction (ALJD at 15).

C. *Debarment of Facchiano Construction*

The ALJ found the conclusion "inescapable" that Facchiano Construction, by failing to pay the prevailing wage and overtime compensation and by falsifying payroll records to make it appear as if the prevailing wage and overtime rates had been paid, had committed aggravated and willful violations of the HCDA and the CWHSSA (ALJD at 15). However, the ALJ further stated that Facchiano Construction had already been debarred for 18 months from participating in HUD contracts. "Since the corporation has not been shown to have bid on any projects other than those administered by HUD," the ALJ stated, "a further 18-month debarment would appear to be appropriate in the circumstances. . . . " Accordingly, the ALJ ordered that Facchiano Construction be debarred for 18 months, rather than the full three-year debarment period requested by the Acting Administrator.

III. DISCUSSION

A. *Claim Preclusion*

Facchiano Construction contends that the doctrine of res judicata operates to bar the Department of Labor from undertaking this debarment proceeding.[1] Like both the district court and the ALJ, however, the Board rejects that contention.

Under the res judicata doctrine, a final judgment on the merits bars further claims by parties or their privies on the same cause of action. As noted by the Solicitor (Response, at pp. 5-7), the critical issue to be examined concerning the application of res judicata to governmental parties is the authority delegated to an agency by Congress to bind the government in a final adjudication. Accordingly, the starting point of our analysis is the authority granted to the Department of Labor by the President and Congress to administer the labor standards applicable to federally funded or assisted construction projects. That authority is clear, for as the Board recently noted, "In the interests of government-wide consistency and the guidance of contracting officers throughout the United States, Congress and the Truman Administration

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[1] As noted by the Solicitor (Acting Administrator's Response to Petition for Review, at p. 4 n.2), Facchiano Construction's arguments before the Board appear to be confined to the res judicata issue, and do not appear to address the application of the collateral estoppel doctrine to this matter. To the extent that application of collateral estoppel remains at issue, the Board's discussion of Facchiano Construction's res judicata affirmative defense at pp. 6-8, *infra*, also applies to the collateral estoppel issue.

enacted Reorganization Plan No. 14 of 1950 (5 U.S.C. App.), wherein the Secretary of Labor was given the authority and responsibility to achieve uniformity and consistency in Davis-Bacon administration." *AT&T Communications*, WAB Case No. 91-09 (Aug. 21, 1991). Indeed, the two Related Acts that are involved in this case – the HCDA (at 42 U.S.C. §§ 5310, 1440(g)) and the CWHSSA (at 40 U.S.C. § 330(d)) – make explicit reference to the authority of the Secretary of Labor under Reorganization Plan No. 14.

The Reorganization Plan explicitly vests the Secretary with the authority to "prescribe appropriate standards, regulations, and procedures" to be observed by federal agencies, and to "cause to be made by the Department of Labor, such investigations, with respect to compliance and enforcement of such labor standards, as he deems desirable." In carrying out this responsibility for administration and enforcement of the labor standards requirements of the Davis-Bacon and Related Acts, the Department of Labor has promulgated 29 C.F.R. 5.12, which provides for government-wide debarment for "aggravated or willful" violations of the Related Acts. See *Janik Paving & Construction, Inc. v. Brock*, 828 F.2d 84 (2d Cir. 1987) (upholding Secretary of Labor's debarment authority for Related Acts violations); *Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368 (D.C. Cir. 1961) (same). Under the statutory and regulatory scheme for Davis-Bacon administration, then, it is the Secretary of Labor, and not HUD, who has primary responsiblity for enforcing the labor standards requirements of Related

Acts such as the HCDA and the CWHSSA and for determining whether government-wide debarment is warranted for violations of those requirements. The authority delegated to the Secretary of Labor by Congress and the President to resolve such matters would seem to defeat Facchiano Construction's contention that res judicata principles preclude the Department of Labor's debarment proceeding.

In addition, we take note of the same two points that were relied upon by the district court and the ALJ in turning aside Facchiano Construction's res judicata and collateral estoppel arguments. Namely, the district court and the ALJ determined that the following two points sufficiently differentiated the HUD and Department of Labor proceedings: (1) the HUD debarment applied to HUD projects only, whereas debarment by the Department of Labor would have government-wide effect; and (2) the focal point of the HUD debarment was the criminal conviction of Facchiano Construction and Michael Facchiano, Jr., whereas debarment by the Department of Labor would be based on the labor standards violations themselves. We agree that these are critical distinctions. First, these distinctions illustrate what we have discussed above – that is, that the Secretary of Labor has the primary responsibility for administering and enforcing the labor standards requirements of the Davis-Bacon and Related Acts. Second, these distinctions demonstrate that the HUD and Department of Labor proceedings simply do not display the identity of cause of action that is required for application of the res judicata doctrine.

Finally, we agree with the Solicitor (Acting Administrator's Response to Petition for Review, at pp. 19-20) that

Facchiano Construction's argument that a government-wide debarment imposed by the Department of Labor would subject the firm to a second period of ineligibility from participation in HUD contracts is not germane to the res judicata issue. Indeed, the Facchiano family business simply switched its active operations to a sole proprietorship, continued to seek and obtain HUD contracts, and was not effectively debarred at all. Thus, neither the firm nor its principals have any basis whatsoever for making an equitable argument that they would be "harmed" by undergoing a second period of ineligibility from HUD contracts.

B. *Debarment of the Facchianos*

As noted above, debarment for violation of the Davis-Bacon Related Acts is governed by 29 C.F.R. 5.12, which provides in Section 5.12(a)(1):

> Whenever any contractor or subcontractor is found by the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of any of the applicable statutes . . . other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed 3 years (from the date of publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list . . .) to receive any contracts or subcontracts subject to [the Davis-Bacon Act or Related Acts].

In his decision and order, the ALJ recognized that "to be of any real effect in insuring future compliance with the requirements of the Acts and regulations governing their federal contract work, a debarment would have to be directed against Michael Facchiano and his two sons" (ALJD at 13). Nevertheless, the ALJ accepted the Facchianos' contention that Section 5.12(a)(1) authorizes only debarment of a "contractor or subcontractor" and not of individual corporate officers. The Board concludes that the ALJ's reading of 29 C.F.R. 5.12 is erroneous, and must be reversed.

The gist of the Facchianos' argument is that 29 C.F.R. 5.12(a)(2) regarding debarment for Davis-Bacon Act violations, specifically refers to placement of the "names of contractors or subcontractors *or their responsible officers*" (emphasis supplied) on the ineligibility list, whereas 29 C.F.R. 5.12(a)(1) does not expressly mention debarment of corporate officers for Related Acts violations.[2] In our

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[2] 29 C.F.R. 5.12(a)(2) states:

In cases arising under contracts covered by the Davis-Bacon Act, the Administrator shall transmit to the Comptroller General the names of the contractors or subcontractors and their responsible officers, if any (and any firms in which the contractors or subcontractors are known to have an interest), who have been found to have disregarded their obligations to employees, and the recommendation of the Secretary of Labor or authorized representatives regarding debarment. The Comptroller General will distribute a list to all Federal agencies giving the names of such ineligible persons or firms, who shall be ineligible to be awarded any contract or subcontract of the United States or the District of Columbia and any contract or

view, Facchiano Construction's argument that the "plain language" of the regulation demonstrates that the Department of Labor lacks authority to debar corporate officers under Section 5.12(a)(1) is defective for several reasons. The plain terms of that section, referring to debarment of "any contractor or subcontractor" found to have committed "aggravated or willful" violations of the Related Acts, do not begin to suggest to us that the debarment of corporate officers of contractors or subcontractors is precluded by the regulation. This conclusion is supported by an examination of other sections of 29 C.F.R. 5.12 – including 29 C.F.R. 5.12(b)(1), which describes the parties to be afforded hearings on debarment issues, and which applies to both Sections 5.12(a)(1) and (a)(2). The regulation provides, in Section 5.12(b)(1):

> [W]henever as a result of an investigation . . . the Administrator finds reasonable cause to believe that a contractor or subcontractor has committed willful or aggravated violations of the labor standards provisions of [the Related Acts], or has committed violations of the Davis-Bacon Act which constitute a disregard of the obligations to employees or subcontractors under section 3(a) thereof, the Administrator shall notify . . . *the contractor or subcontractor and its responsible officers,* if any (and any firms in which the contractor or subcontractor are known to have a substantial interest), of the finding. The administrator shall afford such *contractor or subcontractor and any other parties notified* an opportunity for a hearing as to whether

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subcontract subject to the labor standards provisions [of the Davis-Bacon and Related Acts].

> debarment action should be taken under paragraph (a)(1) of this section or section 3(a) of the Davis-Bacon Act. (Emphasis supplied.)

See also 29 C.F.R. 6.2(d) (setting forth the definition of "respondent" in administrative proceedings enforcing the labor standards provisions of the Davis-Bacon and Related Acts and the Service Contract Act). In addition, we note that 29 C.F.R. 5.12(c), which applies only to Related Acts debarments and which sets forth a procedure for removal from the ineligibility list after serving at least six months on the list, provides that "[a]ny *person or firm* debarred under § 5.12(a)(1) may in writing request removal from the debarment list after six months from the date of publication by the Comptroller General of such *person or firm's name* on the ineligible list." (Emphasis supplied.) In short, the terms used in these other sections of the regulation support the interpretation offered by the Acting Administrator of the language used in 29 C.F.R. 5.12(a)(1).

It is also important to keep in mind the purpose underlying the Department of Labor's Related Acts debarment regulation – that is, to "effectuat[e] compliance, and further[ ] the public policy represented by the labor acts." *A. Vento Construction*, WAB Case No. 87-51, (Oct. 17, 1990) (29 WH 1685), at p. 6, quoting *Copper Plumbing and Heating Co. v. Campbell, supra*, 290 F.2d at 372. See also *Brite Maintenance Corp.*, WAB Case No. 87-7 (May 12, 1989), at p. 5. As the ALJ acknowledged in the instant case, a debarment that is not directed against the principals of an ineligible firm may well be ineffective as a tool for achieving compliance with labor standards requirements. Absent any indication that the Department

of Labor drafted the Related Acts debarment mechanism with the absurd intention of robbing that mechanism of its effectiveness, and absent any express language in the regulation which would preclude debarment of responsible officials, the Board adheres to its consistent precedent which permits debarment of responsible officials for aggravated or willful Related Acts violations. See, e.g., *Brite Maintenance, supra; Marc S. Harris, Inc.*, WAB Case No. 88-40 (Mar. 28, 1991); *Coastal Energy, Inc.*, WAB Case No. 89-07 (June 26, 1991).[3]

C. *The Length of the Debarment Period*

As noted above, 29 C.F.R. 5.12(a)(1) provides for a debarment period "not to exceed three years" for "aggravated or willful" violations of the Related Acts. The investigation of Facchiano Construction's performance on the contracts that were subject to the labor standards

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[3] Facchiano Construction also argues that the Davis-Bacon Act expressly refers in section 3(a) to placement of "*persons* or firms" (emphasis supplied) on the ineligibility list, whereas Related Acts such as the HCDA and the CWHSSA are somehow limited to contractors and subcontractors. However, the authority of the Department of Labor to establish a regulatory debarment mechanism for Related Acts violations has been upheld (see *A. Vento Construction, supra,* at pp. 5-6 and authority cited therein), and the Related Acts simply do not contain any reference precluding the debarment of responsible officials. See also, *Marc S. Harris, Inc., supra,* at p. 2 (noting the entry of a guilty plea by the individual owner of a corporate contractor to a violation of 40 U.S.C. § 328, which sets forth CWHSSA's overtime compensation requirements, and § 332, which provides that "any contractor or subcontractor" who commits an intentional violation of CWHSSA shall be guilty of a misdemeanor).

requirements of the HCDA and the CWHSSA disclosed that the firm submitted falsified certified payrolls; furthermore, as a result of that investigation the firm paid $126,298.27 in back wages to 20 employees. It is established under Board precedent that falsification of certified payrolls is "aggravated or willful" conduct warranting debarment under Section 5.12(a)(1). See, e.g., *Marc S. Harris, supra; A. Vento Construction, supra,* at p. 15, and cases cited therein at p. 7 n.4. The Board has explained that "[f]alsification of certified payrolls is itself deliberate conduct that violates law and regulation; furthermore, submission of falsified payrolls raises a *prima facie* case that any accompanying underpayment of wages or overtime compensation was deliberately undertaken." *Gaines Electric Service Company, Inc.,* WAB Case No. 87-48 (Feb. 12, 1991), at p. 4.

The ALJ in this case failed to debar the three principals of the Facchiano firm at all, and ordered that Facchiano Construction be debarred for 18 months rather than the full three-year debarment period permitted by 29 C.F.R. 5.12(a)(1). However, the Board held in *A. Vento Construction* (at p. 14) that "aggravated or willful" violations of the labor standards provisions of the Related Acts warrant an order imposing a three-year debarment period absent extraordinary circumstances. See also *A. Vento Construction,* at p. 18 (Member Rothman, concurring) (falsification of payrolls warrants a three-year debarment period). The Board finds no extraordinary circumstances present here.

The basis stated by the ALJ for shortening the debarment period to 18 months was the firm's previous debarment for participation in HUD contracts. The obvious

infirmity in the ALJ's approach, however, is the fact that there simply was no effective debarment of the Facchiano family business and its principals from seeking or receiving contracts on HUD projects. See pp. 7-8, *supra*, and ALJD at 9-10, 13; see also, *A. Vento Construction*, at p. 16.

Finally, we disagree with the contention that this matter should be remanded to the ALJ for findings on defenses and mitigating factors applicable to Michael Facchiano, Sr. For the reasons discussed above, a three-year debarment period is warranted for Facchiano Construction and its corporate officers (Michael Facchiano, Sr. is president of Facchiano Construction). Furthermore, Board precedent does not allow a responsible company official to avoid debarment by claiming that the labor standards violations were committed by agents or employees of the firm. See, e.g., *Marc S. Harris, Inc., supra*, at p. 4, and cases cited therein.

IV. ORDER

It is ordered that Facchiano Construction Company, Inc.; and corporate officers Michael Facchiano, Sr., president; Michael Facchiano, Jr., secretary; and John Facchiano, treasurer; shall be ineligible, pursuant to 29 C.F.R. 5.12(a)(1), to receive any contracts or subcontracts subject to any of the statutes listed in 29 C.F.R. 5.1 for a period of three years.[4]

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[4] Persons and firms placed on the ineligible list pursuant to 29 C.F.R. 5.12(a)(1) are permitted to request removal from the ineligible list after completing six months of the debarment period, pursuant to the procedure set forth at 29 C.F.R. 5.12(c).

BY ORDER OF THE BOARD:

Charles E. Shearer, Jr., Chairman
Ruth E. Peters, Member

/s/ Gerald F. Krizan,
Gerald F. Krizan, Esq.
Executive Secretary

DISSENTING OPINION OF SENIOR MEMBER ROTHMAN

I dissent from the part of the majority decision which changes the Administrative Law Judge's 18-month debarment decision to three years.

The ALJ concluded, "Since the corporation has not been shown to have been on any projects other than those administered by HUD, a further 18-month debarment would appear to be appropriate in the circumstances."

HUD debarred Facchiano Construction and Michael Facchiano, Jr., from participating in HUD programs for 18 months. During that 18-month period it appears that the Facchiano enterprise continued to secure HUD contracts. However, I would not turn back the clock to pick up what may be a breakdown in HUD enforcement. In this case that matter would best be left to HUD to straighten out internally.

Nor would I start the clock running again with a new full three-year debarment, thus making the total debarment period with respect to HUD work four and a half years, not three years.

The 18-month period should apply to all three Facchiano principals, the father and two sons. I do not see

the possibility of their being relieved of debarment during the 18-month period.

I would affirm the decision of the Administrative Law Judge imposing an 18-month debarment. If after that time any of the principals should secure additional work and continue the practices that led to this debarment, he could be quickly debarred for an additional three years and other consequences could be considered.

U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center
Pittsburgh, Pennsylvania 15220
412-644-5754 (SEAL)

IN THE MATTER OF	
Proposed debarment for labor standards violations by:	Case No. 87-DBA-14
FACCHIANO CONSTRUCTION COMPANY, INC. a/k/a MICHAEL FACCHIANO CONCRETE CONSTRUCTION COMPANY Contractor	
MICHAEL FACCHIANO, SR. Owner	
MICHAEL FACCHIANO, JR. Owner	
JOHN FACCHIANO Owner	
With respect to laborers and mechanics employed by the contractor under U. S. Department of Housing and Urban Development Project Nos. C.D. VI 2.2.8 (Swissvale Community Development Corporation, Phase IV, Waverly Street Sidewalk/Curb Completion); C.D. VI-3-2, (Braddock, Pennsylvania Economic Development Corp.,	

Cherry Way Park); C.D. VII-7.1 :
(Twin Rivers Council of :
Governments Area Wide Catch :
Basin Program); C.D. VII-7.3, :
(Phase II, Steel Valley Council of :
Governments Catch Basin/Curb .
Ramping Project); C.D. VII-7.4, :
(Turtle Creek Valley Council of :
Governments Area Wide Catch :
Basin/Curb Ramping Program); :
C.D. VII – 7.5, (Char-West :
Council of Governments Catch :
Basin Repair Project); C.D. VIII – :
3.11.2 (Steel Valley Council of :
Governments Catch Basin/Curb :
Ramping Project); C.D. VIII – :
7.5, (Char-West Council of :
Governments Catch Basin :
Reconstruction); C.D. IX -7.5, :
(Char-West Council of :
Governments Catch Basin : :
Project); C.D. IX – 2.2.5, :
(Dormont, Pennsylvania :
Community Development :
Corporation, Potomac Avenue :
Public Improvement, Phase III), :
C.D. IX – 3.2, (Braddock :
Economic Development :
Corporation Catch Basin :
Program); C.D. IX – 3.12.37, :
(Steel Valley Council of :
Governments, Andrews Street :
Water Line Rehabilitation); C.D. :
IX – 7.3, Steel Valley Council of :
Governments, Catch Basin/Curb :
Ramping Program); C.D. IX – 7.4 :

(Turtle Creek Valley Council of :
Governments Catch Basin/Curb :
Ramping Program); C.D. X – 7.2 :
(South Hills Council of :
Governments, Manhole Repair, :
Pleasant Hills); PA R-440, (Urban :
Redevelopment Authority of :
Pittsburgh, Clifton Park Project); :
26429-F (Gomer Street Wall :
Reconstruction); 26933-F (City of :
Pittsburgh, Larimer Avenue :
Grading, Paving and Curbing). :
..... :

APPEARANCES:

Alfred J. Fisher, Jr., Esq.
For the U. S. Department of Labor
Thomas A. Berret, Esq.
For Facchiano Construction Company, Inc, Michael Facchiano, Jr., and John Facchiano, Respondents
Richard Wile, Esq.
For Michael Facchiano, Sr., Respondent
Before: GEORGE P. MORIN
Administrative Law Judge

DECISION AND ORDER

This matter is before me on an Order of Reference of October 2, 1986 from the Administrator, Wage and Hour Division, United States Department of Labor, which referred the case to the Office of Administrative Law Judges with a request for a hearing pursuant to 29 CFR

§5.12(B), concerning proposed debarment of the named respondents for violation of two Davis-Bacon related Acts listed in 29 CFR §5.1, *i.e.*, the Housing and Community Development Act of 1974, as amended, (42 U.S.C. 5310, 1440(g)), and the Contract Work Hours and Safety Standards Act, as amended, (40 U.S.C. 327, *et seq.*)

A hearing was held on January 18, 1990 in Pittsburgh, Pennsylvania. All parties submitted post-hearing briefs. Additionally, the jointly represented respondents and the individually represented respondent, Michael Facchiano, Sr., each filed briefs in reply to complainant's post-hearing brief.

The following abbreviations will be used in this decision: "TR" for the transcript of the January 18, 1990 hearing; RX for respondents' exhibits; JX for joint exhibits of the parties; and Govt. Exh. for the complainant's exhibits.

Statement of Stipulated Facts

Many of the facts in this case are not in dispute, as is evident from the 10-page Stipulation of the Parties, in evidence as JX-1. Facchiano Construction Company, Inc., is a Pennsylvania corporation, primarily engaged in the operation of a concrete contracting business in Pittsburgh, Pennsylvania. Its corporate officers are Michael Facchiano, Sr., President, and his two sons, Michael Facchiano, Jr., and John Facchiano, Secretary and Treasurer, respectively.

The contracts listed in the caption were awarded between the dates of January 1, 1982 and September 30,

1984, and were all funded, in whole or in part, through community development block grants administered by the United States Department of Housing and Urban Development (hereinafter called "HUD"). All of the contracts were subject to and contained representations and stipulations required by the Housing and Community Development Act of 1974, Contract Work Hours and Safety Standards Act (CWHSSA) and applicable DOL regulations at 29 C.F.R. Part 5, and were subject to the labor standard provisions of the Housing and Community Development Act of 1974.

By the terms of the contracts, Facchiano Construction Company was required to pay its employees prevailing union hourly wage rates and fringe benefits. In 1984, the Inspector General's Office of the Department of Labor, in conjunction with the Federal Bureau of Investigation, conducted an investigation of the respondent firm's performance under the contracts. The investigation disclosed that the firm, in some instances, had failed to pay applicable prevailing wage rates and that falsified certified payroll records, showing higher wage rates than were actually paid, were submitted. The payrolls were certified as correct and complete by Michael Facchiano, Jr., or John Facchiano, but none of the falsified certifications were signed by Michael Facchiano, Sr.

As a result of the investigation, back wages totalling $126,298.27 were found to be owing to 20 employees and were paid as prevailing wages and fringe benefits, pursuant to the Act and contracts. A criminal information was filed against the firm and its Secretary, Michael Facchiano, Jr. Both of the defendants pled guilty. On February 22, 1985, Michael Facchiano was sentenced to six

months in prison, fined $2,000.00, and placed on probation for five years. The corporate defendant was also fined $2,000.00. The fines were paid and the individual defendant served the prison sentence.

Thereafter, on May 15, 1985, HUD notified Michael Facchiano, Jr., and Facchiano Construction Company, Inc., that consideration was being given to debaring them from further participation in HUD programs for a three-year period, pursuant to 24 C.F.R. §24.6(a)(9), and, further, that they were temporarily suspended from participation in HUD programs pending a final decision in the matter of the debarment. Briefs and documentary evidence were submitted by the respondents and by HUD, and, on March 5, 1986, HUD's Board of Contract Appeals issued a determination and order. Both respondents were debarred from participation in HUD programs for 18 months, until November 15, 1986, a date reflecting credit given by the Board for the period of the suspension.

While the HUD matter was pending, the Department of Labor, on December 13, 1985, notified Michael Facchiano, Sr., Michael Facchiano, Jr., John Facchiano, and Facchiano Construction Company, Inc., of its intention to seek their debarment from contracting completely with the federal government, pursuant to 29 C.F.R. §5.12(a)(1). In response to respondents' request, the Department of Labor, on October 27, 1986, referred the matter of the proposed debarment to the Office of Administrative Law Judges for a hearing. Thereafter, on February 12, 1987, the respondents, with the exception of Michael Facchiano, Sr., filed suit in the United States District Court for the Western District of Pennsylvania to stay the administrative debarment proceedings on grounds of res judicata and

collateral estoppel. On stipulated facts and cross-motions by the parties for summary judgment, the finding of a United States Magistrate in favor of the Department of Labor was affirmed by Judge Alan H. [sic] Bloch, who entered an order granting the Department of Labor's Motion for Summary Judgment. Both the Magistrate and Judge Bloch found that the doctrines of res judicata and collateral estoppel did not apply to bar the DOL proceeding. On appeal, the Court of Appeals for the Third Circuit affirmed the lower court's denial of Respondent's motion for summary judgment, but reversed the order granting the Department of Labor's motion for summary judgment on grounds the question of whether res judicata or collateral estoppel bar the Department of Labor's action should first be presented and decided at the administrative hearing.

The final matter stipulated to is that all pleadings, stipulations and documentary evidence from any of the foregoing judicial or administrative proceedings are admissible and may be offered by any party in this proceeding. (JX 1)

ISSUES

1. Whether individual respondents are subject to the debarment provisions of 29 C.F.R. §5.12(a)(1);

2. Whether the respondents' failure to pay prevailing wage rates and overtime and their falsification of payroll records constitutes "aggravated or willful" violations of the Davis-Bacon Related Acts under which this action was brought, thus warranting debarment for three years; and

3. Whether this administrative proceeding is barred by the doctrines of res judicata and collateral estoppel because of the prior proceeding, arising out of the same activity, for which a period of debarment has already been served.

Positions of the Parties

It is the complainant's contention that there are numerous precedents for finding falsification of payroll records to constitute "aggravated or willful" violations of Davis-Bacon Related Acts for which a three-year period of debarment may be imposed, and that the same should be imposed here. Complainant does not view the differing phraseology in the regulations governing debarments under the Davis-Bacon Act, as opposed to the Davis-Bacon Related Acts, to be of significance, so as to affect the debarment of the responsible officers in this Davis-Bacon Related Acts case. Complainant argues that the debarment should be for the full three years with no credit given for time Facchiano Construction Company, Inc. and Michael Facchiano, Jr. were debarred from participating in HUD contracts because debarment here will cover participation in all government contracts whereas the earlier debarment applied to only HUD sponsored contracts. And that same distinction is the primary basis for the complainant's argument against the defense of res judicata and collateral estoppel applying in this instance.

Respondents, on the other hand, view as of major significance the difference in the terminology used in the regulations applicable to cases arising under the Davis-Bacon Act as opposed to the Davis-Bacon Related Acts.

As this case only involves "Related Acts" violations, they maintain, the applicable regulations are those contained in 29 C.F.R. §5.12(a)(1), . . . [w]henever any contractor or subcontractor . . . ", and since the individual respondents are neither contractors or subcontractors, they cannot be debarred under this section. They point out that whereas the debarment regulations for Davis-Bacon Act violations specifically refer to responsible officers of contractors and subcontractors, the "Related Acts" subsection does not. No contrary agency interpretation of the clear and unambiguous language of the regulation is justified. Respondents maintain that, contrary to complainant's contention, in this "Related Acts" case, current compliance and the respondents' record of efforts to achieve and maintain compliance should be considered as mitigating factors in imposing sanctions. Respondents point out that while the regulations mention three years as the maximum debarment period, they by no means require that length of time and give complete latitude to the fact finder to impose a shorter period of debarment, or no debarment at all, if the circumstances justify that.

Complainant's Evidence

The government's case consists of the stipulated facts, Govt. Exhs. 1 – 6, the joint exhibits and the testimony of three witnesses.

Bruce B. Woods

Bruce B. Woods is an employee of the Office of the Inspector General, U. S. Department of Labor, and is stationed in Pittsburgh, Pennsylvania. In June 1984, he

was assigned to investigate a complaint received from Margaret J. Rau, a labor compliance officer with the Allegheny County Department of Development. Mrs. Rau reported that there were indications from auditing the certified payrolls and from interviews with employees that Facchiano Construction Company, Inc., was underpaying its employees on federally funded jobs. Mr. Woods obtained certified payrolls for his own analysis from Mrs. Rau and from the various agencies which had entered into federally funded construction contracts with Facchiano Construction Company. He also assembled information from which he compiled a list of different company names and Facchiano family members' names used on the contracts, associated papers and bank accounts. In evidence as Govt. Exh. 1 is a list compiled by Mr. Woods of names used on the contracts and on various documents, including certified payrolls, for some of the projects listed in the caption. A number code was used, the key to which is shown on Govt. Exh. 2. Fourteen variations of the Facchiano name, including the named corporate respondent and four other entities with the abbreviation "Inc." as part of their name, appear on the first page of the exhibit. In addition, seven individual Facchiano family members' names are listed as used at some time while the contracts were in effect.[1]

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[1] Respondents' counsel objected to these exhibits as an attempt to expand the list of "persons" against which a debarment order could run, and contrary to the fact stipulated to by the government that " . . . Facchiano Construction Company" was awarded federally funded construction contracts. The exhibits were received on representation by the government's counsel that they were being introduced for informational pur-

After visiting a construction site, where he observed vehicles of two different Facchiano companies, and after checking bank accounts, Mr. Woods, in July 1984, served a subpoena on John Facchiano and initiated interviews with ten Facchiano employees. From all indications, the Facchianos were not in compliance with the Davis-Bacon Act in respect of payment of wages at the prevailing rate. In examining certified payrolls and from his interviews with employees, Mr. Woods discovered instances where the names of some of the owners were shown as working for eight hours each on three different jobs and of the names of employees who worked on some of the jobs not even appearing on the certified payrolls. (In later testimony, Mr. Woods recalled six instances where this had occurred.) During the summer of 1984, subpoenas were issued to the various company names the Facchianos had been using. Their legal counsel moved to quash and thereafter other subpoenas were issued; a hearing was held before a United States Marshal on a further motion to quash; and the respondents were subsequently ordered to turn their business records over to Mr. Woods's investigation. Shortly thereafter, the plea agreement was worked out between the government and the Facchianos. Mr. Woods testified that prior to the plea agreement signing, he had received no cooperation from the Facchianos as far as surrendering business records was concerned, but that after the signing of the plea agreement, and pursuant

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poses only. I merely make the observation at this point that no attempt was made by respondents to explain their use of multiple and confusing names or by the complainant for bringing the matter up in the first place.

to the conditions thereof, he began to get their cooperation. Two meetings were held in October 1984 between Mr. Woods and the two Facchiano sons, followed by another meeting of the same three persons, and others, on January 21, 1985, at the offices of the F.B.I. in Pittsburgh, where the amounts of and to whom back wages were owing were determined. At these meetings the information he received from the Facchianos was truthful and accurate, Mr. Woods testified.

Margaret J. Rau

Margaret J. Rau, the contact who supplied the information which precipitated the Department of Labor's investigation of the Facchiano's compliance on federally funded contracts, testified that she is a county employee who works as the labor compliance officer for the Allegheny County Department of Development. Her job includes issuing prevailing wage rates to contractors who are bidding on federally funded community development projects. Money for such projects is administered through her agency which itself does not award contracts. Rather, funds are distributed by Allegheny County Department of Development to municipal governments and taxing authorities and to non-profit agencies and corporations.

When a contract has been awarded, Mrs. Rau or one of her two assistants instructs the contractor on record keeping and on proper procedures to be followed in filling out the various forms required of the contractor in a federally funded project. One such form is the weekly payroll, which Mrs. Rau's agency routinely audits. Mrs.

Rau also visits the sites where the work is being performed and interviews the employees she finds working there for the purpose of determining whether they are being paid at the appropriate wage rate. It was during the course of one of these "site interviews" that she observed that posters which she distributes to all contractors, advising employees of their rights with respect to being paid overtime rates of pay for hours in excess of eight in one day and forty in one week, were not posted as required. Neither were the prevailing wage rates posted nor posters required by OSHA and EEO. Information obtained at the Facchiano construction site interviews was compared with that contained in the certified weekly payrolls already in her possession, and discrepancies were uncovered. Mr. Woods's office was notified, as he indicated in his testimony, after which Mrs. Rau's role in the investigation was limited to that of a witness. Mrs. Rau's department stopped payment on all of the several projects it was funding in which the Facchianos were the contractor, pending a determination of the question of restitution of monies owed to underpaid employees. The agency is able to control payments by virtue of the fact that money used by the contracting agencies to pay contractors remains under control of the Allegheny County Development Department. Federal and state income tax and FICA withholdings were paid for unreported and underpaid employees out of monies posted as performance bonds by the Facchianos on ongoing community development work. Mrs. Rau testified, finally, that after the HUD debarment in 1985, Michael Facchiano, Sr., who was not debarred, received a few small contracts (under $40,000 each) through her agency, but neither Michael

Facchiano, Jr., or Facchiano Construction Company, Inc., under those names, bid on or were awarded any contracts between the date they were suspended in May 1985 and the date the HUD debarment ended in November 1986.

Complainant's only other witness, Bruce Ziegler, was called in rebuttal at the conclusion of the respondents' cases. His evidence will be discussed after the respondents' evidence has been analyzed and findings made on the basis thereof.

Respondents' Evidence

Michael A. Facchiano, Jr.

Michael A. Facchiano, Jr., was born April 24, 1956. He was 28 years old when the investigation began in 1984, and is now 34. He testified that he attended local schools in Pittsburgh and was a 1979 graduate of Point Park College in that city. His bachelor's degree was awarded in business. While in school, he worked for his father during summer vacations as a laborer and truck driver. He apparently grew up in the business and as would be expected became associated with it on a full-time basis when he finished his formal education. At the time he began his permanent employment with his father, the annual gross revenue of the company was between $400,000 and $500,000, all but approximately 20 percent of which came from residential concrete work such as putting in sidewalks and driveways. The remainder was commercial work and the younger Facchiano set upon a plan to increase the company's commercial work and along with it revenue. He increased the amount of their bond and obtained bank financing to help achieve this

goal. The main effort, however, was bidding on and hopefully being awarded contracts for federally funded projects. In the years 1982, 1983 and 1984, between 70 and 75 percent of annual company revenues of from $1 million to $1.2 million came from federally funded work.

In the years prior to 1984, the company was the subject of three investigations for Davis-Bacon Act violations, involving travel time, failure to pay overtime, and misclassification of workers. The amounts involved were relatively small: $2,800 on one, $400 on another and just $45 on the third. Apparently, restitution was all that was required of the company as a result of these investigations. Nevertheless, despite these earlier brushes with the law, or at least involvement with the authorities, Michael Facchiano, Jr., embarked on a scheme to increase the company's revenue and thereby enhance his business stature in the eyes of his father. This involved the deliberate misclassification of employees, payment of less than prevailing wages required in the federally funded contracts and the failure to pay overtime when a worker exceeded the 8 hours in one day/40 hours in one week limits: in short, the practices to which the witness admitted at the plea agreement hearing before Judge Bloch. The witness testified that other contractors were doing the same thing and he felt it was necessary for his father's company to follow suit in order to occasionally be the low bidder on the numerous contracts they bid on, and to grow as a company.

In response to questions about his father's involvement in the scheme, the witness testified that his father, who can neither read nor write, was not involved in the process of drawing up bids nor did his name appear on

any of the certified payrolls as other than an employee. The elder Facchiano, he testified, would verbally report to his daughter, who kept the books and made up the payroll, at the end of each work day, and, from memory, give her the hours the crew worked on the job that day. He stated that his father was active on the job at the construction sites; was unaware of the scheme to expand the company by illegal means; and would have preferred to keep the company small and to remain in the residential concrete business.

Immediately after the suspension took effect, Michael Facchiano, Jr., resigned his position as an officer of the corporation and ceased all managerial duties. He went to work as an employee of his father's business (Michael Facchiano Contracting), more or less as a foreman. At the time of the suspension, the company hired a new employee to be office manager whose principal duties were to check payroll certifications and wage rates. Job supervisors stationed at each job began to collect data necessary to make up the payroll and to turn their work product over to the office manager for final processing. These procedures replaced haphazard and disorganized methods of compiling data in use before the investigation began. Payroll data has now been computerized, in a further attempt to avoid errors. The company signed union contracts with three building trade unions (cement workers, carpenters and laborers) in 1988, and the unions are now directly involved in monitoring on their members' behalf wages, job classifications and hours.

An employee handbook was also compiled and distributed to all employees. (RX 1) This handbook explained in detail the rights and obligations of

employees in matters of pay, classification, hours, conduct on the job, benefits while employed and after a layoff or termination, and safety. Distribution of the employee handbook ceased, the witness testified, "when we became signatory to union agreements" in November of 1988. (TR 95)

The witness was questioned about the present earnings of the company. In 1987, gross volume of the business was approximately $4 million; in 1988, $5.5 million; and the witness estimated for 1989, "in the neighborhood of approximately five, five and a half million." (TR 105) When asked about their contract bidding activity in 1987, the witness stated that of 25 projects they bid on, they were the successful bidder on seven or eight. They bid on 50 or 60 in 1988 and were awarded "no more than 10." On the 25 they bid in 1989, they were awarded eight or nine contracts. (TR 110) Facchiano Construction Company, Inc., the corporate respondent, is still in existence, Michael Facchiano, Jr., testified, but it is inactive. It has not taken on any work since the investigation began and Michael Junior resigned his position in the corporation. The only active business is the sole proprietorship, Michael Facchiano Contracting. The union contracts, alluded to by this witness and more fully described below, are with the proprietorship. Michael Junior was asked his status in the "business" as it is now organized, (TR 112), and he replied that he is employed as a superintendent, but that additionally he is involved in the bidding process, purchase of equipment, employee relations, and general office procedures. His brother John has acquired an engineering degree and is also involved in bidding, along with a full-time estimator who is now carried on

the payroll. Michael Facchiano, Sr., owns the business and the equipment. He also owned the equipment during 1982, 1983 and 1984 when the corporation was the active business entity. The corporation leased the equipment from Michael Senior. (Tr 128) And, apparently, the same employees who worked for the corporation are (generally) employed by the proprietorship. (TR 129)

Lewis Dennis Martire

Lewis Dennis Martire is president of Laborers Local No. 1058 and testified that Michael Facchiano Contracting became a signatory to a union contract in or around November 1988. The principal reason this person was called as a respondents' witness was to describe the union's involvement in verifying the accuracy of signatory's payrolls to insure union member [sic] are paid the proper rates for the proper classifications on hours worked. Not only are records checked after the hours have been worked and reported, but union stewards and field representatives, present on the job, are able to talk to the workers and discuss these matters on a current basis. The witness testified that no problems have arisen with Michael Facchiano Contracting since the contract was signed. Welfare and pension payments have been properly made, and laborers referred to the company for employment have been hired when there have been openings.

James T. Strutt

James T. Strutt is the business representative of Local No. 2274 of the United Brotherhood of Carpenters and

Joiners of America, which has organized the carpenters employed by Michael Facchiano. He authored a January 12, 1990 letter to the elder Facchiano stating his union's general satisfaction in all its dealings with Facchiano since the organization took place. (RX 5) Prior to organization, however, Mr. Strutt vigorously pursued a policy opposed to the Facchianos being permitted to bid on federally funded projects in view of the pendency of the instant debarment proceeding. This opposition took the form of letters to members of Congress and Department of Labor officials inquiring about this matter. Mr. Strutt testified that procedures similar to those described by Mr. Martire are now in place to monitor rates of pay, classifications and hours worked by union members on Facchiano projects.

Rebuttal Witness

Bruce Ziegler

Bruce Ziegler, a heavy equipment operator employed by Frank's Contracting, is a former employee of Facchiano Construction Company, Inc. He worked as a laborer and heavy equipment operator for the company in the years 1982 and 1983. He worked on federally funded projects but was unaware of the prevailing wage rate requirements on such projects until he heard about them from other employees. He worked under the elder Facchiano's supervision most of the time. At times he complained to Mr. Facchiano and to Mary Jean Casamassa, Mr. Facchiano's daughter, that he was not being paid adequately for overtime hours. Sometimes the overtime hours appeared in his next paycheck, other

times they did not. Mr. Facchiano promised the witness that he would be getting a raise in 1984, when Facchiano would be beginning work on new projects, but the witness never saw the raise since he was laid off in December 1983. At the time he was laid off, his rate was $7.00 per hour, but he was unable to check this rate against the prevailing wage rate which was supposed to be in the contract specifications binder kept at each job site because the page where this information was given had been ripped out of the binder.

Res Judicata and Collateral Estoppel

The charging letter from HUD to Michael Facchiano, Jr., dated May 15, 1985, and signed by Alfred C. Moran, Assistant Secretary for Community Planning and Development, advised Mr. Facchiano that he is considered to be a contractor or grantee under Title 24, Code of Federal Regulations, Section 24.4(f); that his mail fraud conviction is evidence of irresponsibility and cause for debarment under 24 C.F.R. § 24.6(a)(9); and that prior to a final determination of the debarment issue, he has the right to make written request to submit documentary evidence and written briefs, as described in Subpart C of the regulations. Mr. Facchiano, by counsel, made timely request for the opportunity to submit documentary evidence and a written brief, and to have a hearing and an opportunity to be heard.[2]

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[2] The HUD administrative law judge, in his "Determination" (of which more later), pointed out that under the regulations, when a proposed debarment is based on a conviction, the hearing is limited, as stated in the charging letter, to the submis-

The HUD debarment regulations are clearly related to criminal activity. At 24 C.F.R. § 24.305, Causes for Debarment, it is stated that debarment may be imposed for conviction or civil judgement [sic] for such criminal conduct as commission of fraud in obtaining or attempting to obtain a public or private agreement or transaction, violation of federal or state antitrust statutes, commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, or for the commission of any other offense indicating a lack of business integrity or business honesty. The final subsection of § 24.305, subsection (f), begins with the words: "In addition to the causes set forth above, HUD may debar a person from participating *in any program or activities of the Department . . .* " (emphasis added). The quoted and underscored material indicates that HUD debarments affect only HUD activities.

In his March 5, 1986, Determination, the HUD administrative law judge indicated that the serious sanction of debarment is imposed to assure that the Department does business only with responsible contractors and grantees, and not for punitive purposes. He determined that Michael Facchiano, Jr., and the corporation[3] had been convicted of a crime (mail fraud) which could be the basis for HUD debarment, but before making his final determination, he reviewed respondents' evidence in mitigation

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sion of documentary evidence and written briefs. Accordingly, he denied the request for oral hearing.

[3] The corporation received a separate charging letter which is not among the documents in evidence in this case.

(cooperation, assurances against recurrence, restitution, no prior record, testimonials to good character). While the ALJ earlier stated that the proposed debarment was tied to respondents' mail fraud convictions, he seemed to base the debarment he found to be justified on all aspects of their scheme to defraud employees. At the same time the mitigating factors urged by respondents as supporting a finding of present responsibility were not considered adequate for respondents to avoid debarment altogether, the ALJ did consider them sufficient to reduce the debarment period from the possible three-year length to just 18 months, with credit given for prior time while under suspension.

In granting the Department of Labor's Motion for Summary Judgment and dismissing the Facchiano's motion for the same relief, the Magistrate appointed by the United States District Court for the Western District of Pennsylvania found to be controlling the fact that the HUD debarment went to HUD projects only, while the DOL debarment would have government-wide effect, and the further fact that the HUD debarment was based on the criminal conviction while the DOL debarment, if any, would be based on the Davis-Bacon Act violations themselves. United States District Court Judge Bloch adopted the Magistrate's report and recommendations as the opinion of the court.

In a lengthy opinion in *Facchiano v. U.S. Dept. of Labor,* 859 F.2d 1163 (3rd Cir. 1988), the Court of Appeals for the Third Circuit referred the issue of claim preclusion to the Department of Labor administrative law judge to decide as a mixed question of fact and law.

I find, as did the United States Magistrate and Judge Bloch, who had the same arguments before them as I do, that the bases for the two debarment proceedings (violations of Davis-Bacon Acts, on the one hand, and conviction of a serious crime, on the other) as well as the limited vs. broad application of debarment by the two agencies, sufficiently distinguish the proceedings to defeat the res judicata and collateral estoppel defences. With this finding, which is, in effect, a finding that I have jurisdiction, I am able now to proceed with an adjudication on the merits.

Debarment of Individual Respondents

Respondents appear resigned to entry of an order debarring Facchiano Construction Company, Inc., as well they might, in view of the fact that such an order would have little if any effect on the family's operation, given the inactive status of the corporation and the robust growth of Michael Facchiano Contracting since the era of the criminal proceedings and the HUD debarment action. Clearly, to be of any real effect in insuring future compliance with the requirements of the Acts and regulations governing their federal contract work, a debarment would have to be directed against Michael Facchiano and his two sons. They vigorously object, and question this court's authority to enter an order debaring them, as responsible officers in this "related Acts" case. The government has cited to several Wage Appeals Board cases where such orders were entered in related Acts cases.[4]

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[4] *In the Matter of Brite Maintenance Corporation & Mark Charpentier, President/Treasurer,* WAB Case No. 87-7 (May 12, 1989); *In*

However, it does not appear, from my reading of the cited cases, that in any of them was the precise issue here presented discussed. The Wage Appeals Board simply took for granted that in related Acts cases, just as in Davis-Bacon Act cases, the debarment order would encompass the responsible officers as well as the corporate entity which had entered into the contract or contracts with the government.

As an appendix to his written closing brief, counsel for the government attached a copy of a 1986 letter from Assistant Administrator Valin to an attorney in Bismarck, North Dakota, who questioned the extent of coverage of a debarment order in a related Acts case. The attorney's argument was the same as is being asserted by the respondents here: Since "responsible officers" are mentioned in § 5.12(a)(2), when addressing debarment under the Davis-Bacon Act, but are not mentioned in § 5.12(a)(1) when addressing debarment in other than Davis-Bacon Act cases, the distinction should be recognized and observed. The Assistant Administrator advised that the DOL has consistently interpreted § 5.12(a)(1), and a predecessor regulation as well, as authorizing debarment of "responsible officers." He also found support in the language of § 5.12(b)(1) where no distinction seems to be made between debarments under the two section. I am unimpressed by the reasoning used in this letter which

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the Matter of Homer L. Dunn Decorating, Inc., & Homer L. Dunn, President & Owner, WAB Case No. 87-3 (March 10, 1989); *In the Matter of Rust Construction Co., Inc., and Jerry Rust, President, and Sandra Rust, Vice-President,* WAB Case No. 87-15 (Oct. 2, 1987); and *Camilo A. Padreda General Contractor, Inc., and Camilo A. Padreda, President,* WAB Case No. 87-1 (Aug. 3, 1987).

seems to substitute precedent steeped in history for true legal precedent.

I have searched for reported Wage Appeals Board cases as well as cases decided by administrative law judges for one on point, but without success. If, as I believe, this is a case of first impression, I must find in favor of the individual respondents. A valid issue has been raised and the administrator, in my judgment, did not meet his burden of proof on that issue. Not only did he fail to explain why the language in the two subsections differs, but he did not seem even to want to recognize that the difference exists. Further, I am puzzled by the fact that while in each of the Wage Appeals Board cases the government cited the named "responsible officers" were captioned with their corporate titles, in this case they were not but, rather, were called "owner", which, except in the case of Michael Facchiano, Sr., does not seem to be correct. Ownership of Facchiano Construction Company, Inc., could only be through ownership of the corporation's stock. The stipulation does not cover the subject of stock ownership and nothing adduced at the hearing shed any light on the matter. I find that in this "related Acts" case any debarment order entered should be directed against only the corporate respondent for the reasons stated above.

Based upon the stipulation and facts found herein, the conclusion is inescapable that Facchiano Construction Company, Inc., in failing to pay the prevailing wage and overtime to its employees and for falsifying payroll records to make it appear that such prevailing wage and overtime rates had been paid, was in aggravated and willful violation of the labor standards provisions of the Housing and Community Development Act of 1974 and

the Contract Work Hours and Safety Standards Act. When an aggravated and willful violation finding is made, the Wage Appeals Board consistently finds debarment to be an appropriate sanction, and generally imposes it for the maximum allowable period of three years. *See: Brite Maintenance Corporation, supra.*

In this case, however, the corporation has already been debarred for 18 months from participating in HUD contracts. Since the corporation has not been shown to have bid on any projects other than those administered by HUD, a further 18-month debarment would appear to be appropriate in the circumstances which include consideration given to all of the mitigating factors discussed above.

ORDER

Having concluded that Facchiano Construction Company, Inc. committed willful and aggravated violations of the Housing and Community Development Act of 1974 and the Contract Work Hours and Safety Standards Act, IT IS ORDERED, pursuant to 29 C.F.R. § 5.12(a)(1), that Facchiano Construction Company, Inc., shall be ineligible for a period of 18 months to receive any contract or subcontract subject to any of the statutes listed in 29 C.F.R. § 5.1(a).

/s/ George P. Morin
GEORGE P. MORIN
Administrative Law Judge

GPM:mv

Dated: SEP 27 1990
Pittsburgh, PA

WAGE APPEALS BOARD

LIST OF PERSONS INTERESTED IN CASE NO. 91-06

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Copies of the foregoing Decision of the Wage Appeals Board were mailed or otherwise distributed to the listed Parties and Interested Persons on August 29, 1991.

/s/ Gerald F. Krizan
Gerald F. Krizan, Esq.
Executive Secretary

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

MICHAEL FACCHIANO, JR., et al.,	)	
Plaintiffs,	)	Civil Action
v.	)	No. 86-2711
THE UNITED STATES DEPARTMENT OF LABOR, et al.,	)	
Defendants.	)	

MAGISTRATE'S REPORT AND
RECOMMENDATION

I. *Recommendation*

It is respectfully recommended that the defendants' motion for summary judgment be granted.

II. *Report*

Presently before the Court for disposition is the defendants' motion to dismiss for lack of jurisdiction and cross motions for summary judgment.

The facts are basically uncontested and are set forth in the parties joint stipulation filed on June 30 1987. Facchiano Construction Company ("the Company") is a corporation engaged in the operation of a concrete constructing business. Michael Facchiano and John Facchiano are officers of the company. During the period between 1982 and 1984, the company was engaged in construction

projects which were partially funded by the Department of Housing and Urban Development ("HUD"). During the summer of 1984 the Department of Labor ("Labor") conducted an investigation, and determined that the company had been paying its employees less than the prevailing wages applicable under the Davis-Bacon Act, 40 U.S.C. § 267a, *et seq.*; that the company had not properly paid the amount of overtime compensation required under the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 327 *et seq.* and that the company had falsified its payroll records to reflect compliance with those Acts. Thereafter, a criminal information was filed in this Court and on February 22, 1985, Michael Facchiano, Jr. and the company pled guilty to two counts of mail fraud. Michael Facchiano, Jr. was sentenced to six months incarceration on February 22, 1985 and fines were levied against both him and the Company. In addition, back wages were paid to company employees.

Subsequently, HUD filed an administrative complaint against Michael Facchiano and the Company seeking to debar them from participating in HUD funded programs and by order dated March 15, 1986, it was directed that they be debarred from participating in any HUD funded project until November 15, 1986. Since no party appealed from that decision, it became final on April 5, 1986.

In the interim, Labor also commenced a debarment proceeding, and the plaintiffs notified Labor of the ongoing HUD proceeding. On October 2, 1986, Labor issued its Order of Reference of the matter to another Administrative Law Judge. However, by Order of this Court dated June 2, 1987, further administrative action was enjoined pending further proceedings.

The instant suit was commenced pursuant to Section 702 of the Administrative Protection [sic] Act, 5 U.S.C. § 551, *et seq*, as well as 28 U.S.C. § 1331 and 1361, on December 22, 1986 by the plaintiffs seeking to enjoin Labor from proceeding with the debarment proceedings; issuance of a writ of mandamus directing Labor to terminate the debarment proceedings, and such other relief as may be deemed appropriate. The defendants have now moved to dismiss this action and the parties have also submitted cross motion for summary judgment.

Motion to Dismiss

In its motion to dismiss the defendants allege that this Court lacks subject matter jurisdiction in that the plaintiffs have failed to exhaust the available administrative remedies. This allegation is not appropriate at the motion to dismiss stage.

The defendants contend that since the plaintiffs have not exhausted their administrative remedies they are not entitled to judicial relief. *McKart v. United States*, 395 U.S. 185, 193 (1969). The general rule was stated by the Supreme Court in *Myers v. Bethlehem Corp.*, 303 U.S. 41, 50-52 (1983) wherein it was observed:

> the long settled rules of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted . . . the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing

> would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.

However, while the requirement of exhaustion of administrative remedies is the general rule, it is a judicially created rule and does not affect a court's subject matter jurisdiction. Accordingly, the Third Circuit has recognized three situation [sic] in which the requirement of exhaustion may be waived. *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231 (sic) 3d Cir.1980).

The first situation is "when the challenged agency action presents a clear and unambiguous violation of statutory or constitutional rights . . . " *Susquehanna*, 619 F.2d at 245. *See also, First Jersey Securities, Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979). The exhaustion requirement may also be waived when following administrative guidelines is "clearly shown to be inadequate to prevent irreparable injury," *Babcock and Wilcox Co. v. Marshall*, 610 F.2d 1128, 1138 (3d Cir. 1979), quoting *American Fed'n. of Gov't. Employees v. Resor*, 442 F.2d 993, 994-95 (3d Cir. 1971). Lastly exhaustion may be waived if resorting to it would be futile. *Susquehanna*, 619 F.2d at 245.

In order to determine whether the plaintiffs' complaint fits within one of these exceptions, a court must make "a careful analysis of the statutory scheme relied on by the plaintiff, of the completeness or incompleteness of remedies available from the agency, [and] of the presence or absence of harm pendente lite." *Susquehanna*, 619 F.2d at 246. However, the Third Circuit has held that a Rule

12(b) motion to dismiss is not the appropriate means for securing such an analysis. *Id.*

Motion for Summary Judgment

The defendants contend that the plaintiffs' present action should be barred by the judge-made doctrine of exhaustion of administrative remedies. We have earlier discussed the three generally held waivers to this doctrine. Two of the three waivers clearly do not apply. First, irreparable injury is not an inevitable outcome of following administrative guidelines. The injuries envisioned by the plaintiffs, litigation expenses and loss of business are the normal cost of litigation. Such cost has been held not to be 'irreparable injury', *Myers*, supra at 51. Second, resorting to administrative remedies would not be futile, as the plaintiff could raise any defenses, including that of res judicata and collateral estoppel in an administrative hearing and on appeal. Further, it appears that the plaintiffs would not become ineligible to work on Department of Labor projects until after a final agency decision.

A third waiver could apply here, "when the challenged agency action presents a clear and unambiguous violation of statutory or constitutional rights . . . " *Susquehanna*, 619 F.2d at 245. When the procedure itself is alleged to be violative of a constitutional right, exhaustion has not been required. *Babcock and Wilcox Co. v. Marshall*, 610 F.2d 1128, 1138 (3rd Cir. 1979). For example when the administrative procedure would subject "a party to 'vexatious and harassing' prosecution by refusing to apply collateral estoppel." *Babcock v. Wilcox*, 610

F.2d at 1138, citing *Continental Can Co., U.S.A. v. Marshall*, 603 F.2d 590, 596 (7th Cir. 1979).

Whether the plaintiff's res judicata and collateral estoppel arguments are valid depends on whether DOL was bound by the prior HUD action. The plaintiffs contend that the HUD debarment was based upon Section 7(1)(3) of Policy Letter No. 82-1 issued by the Office of Federal Procurement Policy. This letter was subsequently incorporated within 48 C.F.R. 9.4 et seq. Debarments of contractors under this section are "effective throughout the executive branch of the Government . . . " 48 C.F.R. 9.406-1(c).

Neither the plaintiff nor the defendant have provided case law to support their reading of agency debarment policy. However, from the language of the regulation it appears that 48 C.F.R. 9.4 *et seq.* refers to federal procurement contracts. A contractor is defined by that regulation as an individual or entity which:

> (a) submits offers for, is awarded, or reasonably may be expected to submit offers for or be awarded a Government contract or a subcontract under a Government contract or
>
> (b) Conducts business with the Government as an agent or representative of another contractor.

48 C.F.R. 9.403.

So that all agencies will be aware of the debarment of procurement contractors, the General Services Administration (GSA) is required to "[c]ompile and maintain a

current consolidated list of all contractors debarred, suspended, or declared ineligible by agencies or by the General Accounting Office . . . " 48 C.F.R. 9.404(1)(1). Facchiano Construction Company was not placed on such a list. U.S. G.S.A. Consolidated list of Debarred, Suspended and Ineligible Contractors, October 1986.

While 48 C.F.R. 9.4 may facially appear to be across the board in application, the language of 9.406-1 limits it [sic] applicability to debarments "for any of the causes in 9.406-2, using the procedures in 9.406-3." 48 C.F.R. 9.406-1. The regulation defines debarment for its purposes as an "action taken by a debarring official under 9.406 . . . " 48 C.F.R. 9.403. The regulation does not state that "any" debarment by an agency has government-wide effect, merely that those actions taken under 9.406 have such affect.

The record here demonstrates that Facciano (sic) Corporation was debarred from participating in federal assistance programs under HUD. Federal assistance programs appear not to be covered under 48 C.F.R. 9.4 *et seq.* "This subpart does not apply to recipients of Federal assistance." 48 C.F.R. 9.401. Subsequent to the HUD proceeding, in February 1986, the President signed an Executive Order authorizing the issuance of guidelines which would provide that a debarment from an agency's federal assistance program would work to bar the violator from any other federal agency's assistance program. The Office of Management and Budget (OMB) set forth on May 29 1987, "Guidelines for Nonprocurement Debarment and Suspension." 52 Fed. Reg. 20360, No. 103, Doc. 84-12317. These guidelines are "similar to that currently in effect

for procurement" contracts. *Id.* It is clear that nonprocurement contracts which include "both direct assistance [e.g. grants, cooperative agreements, scholarships, and fellowships] as well as indirect benefits [e.g. insurance and loan guarantees]", *Id.*, were not covered by the guidelines of 48 C.F.R. 9.4 *et seq.*

The plaintiffs were debarred under a HUD proceeding which limited the debarment to HUD funded projects. The applicable HUD regulation defines "debarment" in pertinent part as "exclusive from a participation in HUD programs . . . " 24 CFR 24.4(a) Further, the HUD proceeding was based on the narrow fact situation of Facchiano Construction Co. and Michael Facchiano Jr's. criminal convictions for mail fraud. The DOL proceeding is based on the issue of the plaintiffs' violations of the Davis-Bacon Act, 29 C.F.R. 5.1 *et seq.* If the Secretary of Labor finds a violation of Davis-Bacon the subsequent debarment not only suspends the offending contractor from contracts with the DOL, but also with all government agencies. 29 C.F.R. 5.12(a)(2) states:

> In cases arising under contracts covered by the Davis-Bacon Act, the Administrator shall transmit to the Comptroller General the names of the contractors . . . who have been found to have disregarded their obligations to employees, and the recommendation of the Secretary of Labor or authorized representative regarding debarment. The Comptroller General will distribute a list to all Federal agencies giving the names of such ineligible person or firms, who shall be ineligible to be awarded any contract or subcontract of the United States . . .

It appears from this reading of the regulations that there is an insufficient relationship between the debarment proceeding brought by HUD, and the proceeding by DOL which the plaintiffs seek to enjoin. The only similarities shown are that Facchiano Construction Company was the defendant, an agency of the federal government was involved, and that Facchianos' violations of the Davis-Bacon Act underlay the Agency actions. However, important differences remain. The HUD action only, and could have only, debarred Facchiano from HUD contracts, while the DOL action would have government-wide effect. Further, the HUD action was based on a criminal conviction, the result of Davis-Bacon violations; the DOL action is based on the Davis-Bacon violations themselves. For the foregoing reasons, the plaintiff's claim for injunctive relief should be denied.

Summary judgment is appropriate where there no (sic) material factual issues in dispute, and the movant is entitled to judgment as a matter of law. *Disabled in Action v. Sykes*, F.2d (3d Cir. No. 87-1021, filed November 23, 1987.) Because there are no material factual issues in dispute, and because it appears as a matter of law that judgment in favor of the defendants is appropriate, it is respectfully recommended that the defendants' motion for summary judgment be granted.

Respectfully submitted,
/s/ ROBERT C. MITCHELL
ROBERT C. MITCHELL
United States Magistrate

Dated: December 16, 1987

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MICHAEL FACCHIANO, JR., et al.,	)	
Plaintiffs	)	
v.	)	Civil Action
THE UNITED STATES DEPARTMENT OF LABOR, et al.,	)	No. 86-2711
Defendants	)	

ORDER

AND NOW, this 16th day of February, 1988, after the plaintiffs, Michael Facchiano, Jr., et al., filed an action in the above-captioned case, and after the defendants filed a motion to dismiss for lack of jurisdiction and cross motions for summary judgment were also filed, and after the Report and Recommendation was filed by the United States Magistrate, and the parties were granted ten days in which to file objections thereto, and after the plaintiffs filed objections, and the defendants filed a response to the plaintiffs' objections, and upon independent review of the pleadings, and the Magistrate's Report and Recommendation, which is adopted as the opinion of this Court,

IT IS ORDERED that the defendants' motion to dismiss is denied and the defendants' motion for summary judgment is granted.

/s/ Alan N. Bloch
United States District Judge

cc: Albert W. Schollaert, Esquire
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Hon. Robert C. Mitchell
United States Magistrate

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3143

MICHAEL FACCHIANO, JR., JOHN FACCHIANO, and FACCHIANO CONSTRUCTION COMPANY, INC.,

Appellants

v.

THE UNITED STATES DEPARTMENT OF LABOR, THE SECRETARY OF LABOR, WILLIAM E. BROCK, in his official capacity and JAMES L. VALIN, in his official capacity,

Appellees

On Appeal From the United States District Court for the Western District of Pennsylvania

(D.C. Civil No. 86-2711)

Argued July 19, 1988

Before: HIGGINBOTHAM, BECKER and ROSENN, *Circuit Judges*

[Filed October 21, 1988]

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

Following an administrative proceeding, appellants, Facchiano Construction Company, Inc. ("Facchiano Construction") and one of its principals, Michael Facchiano, Jr., were debarred in 1986 by the Department of Housing and Urban Development ("HUD"), from participating for a period of 18 months in HUD-sponsored contracts. This debarment was based upon the conviction of Michael Facchiano and Ficchiano Construction on mail fraud charges which arose out of the determination of the Department of Labor ("DOL") that they had falsified records to conceal violations of the Davis-Bacon Act, 40 U.S.C. § 276a (1982), and the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 327-332 (1982) in connection with work on HUD-sponsored contracts.

DOL thereupon sought to debar appellants, Facchiano Construction, and its officers, Michael Facchiano,

Jr., and John Facchiano,[1] from *all* government contracts for a period of three years on the grounds of the underlying Davis-Bacon violations. Appellants responded with a suit in the district court for the Western District of Pennsylvania seeking to enjoin the administrative proceeding on the grounds that it was precluded by the previous debarment. The district court granted summary judgment for DOL. This appeal presents the question whether a suit for injunctive relief will lie in the district court under these circumstances, or whether appellants must instead, pursuant to the exhaustion of administrative remedies doctrine, present the preclusion defense in the administrative proceedings.

Although a court can enjoin administrative proceedings when an agency undertakes vexatious litigation, the district court found that not to be the case here, and its finding is supported. However, the district court failed to consider the well-established principle that administrative tribunals are fully capable of considering preclusion defenses, and it contravened the related exhaustion doctrine by reaching the merits and determining that the HUD debarment in fact had no preclusive effect on the DOL debarment proceeding. Therefore, while we will affirm the grant of summary judgment against appellants insofar as it denied injunctive relief, we will vacate the opinion of the district court insofar as it adjudicates the merits of the preclusion issue. The agency will be able therefore to resume its proceedings and address the issue itself.

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[1] DOL also sought to debar Michael Facchiano, Sr., who is not a party to this suit.

I.

After Facchiano Construction had performed a number of construction projects sponsored by HUD's Community Development Block Grant program, DOL conducted an investigation which revealed that it had been falsely certifying the wages paid to the employees who were working on the HUD-sponsored projects. The investigation, completed in 1984, disclosed that the wages and overtime pay were below those required by the Davis-Bacon Act, 40 U.S.C. § 276a (1982), and the Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 327-332 (1982). Because of false wage certifications sent through the mails, Michael Facchiano, Jr. and Facchiano Construction were indicted for mail fraud in February 1985, they waived indictment and pleaded guilty. The district court required them to make restitution of $126,000 to the employees and fined Michael Facchiano and the Facchiano Constriction $2,000 each. Michael Facchiano also received a prison sentence of six months followed by five years probation.

In May 1985, following the mail fraud conviction, HUD initiated an administrative action to debar Michael Facchiano, Jr. and Facchiano Construction from HUD-sponsored contracts pursuant to 24 C.F.R. § 24.6(a)(1), (4), and (9) (1985). Under these regulations, HUD can debar contractors who have been convicted of crimes committed in the pursuit, the attempt to pursue, or the performance of public or private contracts, where the conviction(s) have put the contractors' integrity in doubt or where the conduct involved is deemed "serious" by the Assistant Secretary of HUD. On May 15, 1985, HUD notified Michael Facchiano and Facchiano Construction

of its proposed debarment and requested submission of briefs and supporting material in accordance with 24 C.F.R. § 24.7(a) (1985).[2] In a final order dated March 5, 1986, the HUD administrative law judge ordered an 18-month debarment from contracts awarded by HUD. This order was not appealed.

In December 1985, DOL notified appellants that it was initiating its own debarment proceeding under 29 C.F.R. § 5.12(b)(1) (1985). This regulation enables DOL to debar contractors for willfully violating the Davis-Bacon Act and other regulatory labor standards. DOL sought to debar appellants from all government contracts for three years. Rather than avail themselves of the opportunity to contest this second debarment in the administrative forum, appellant immediately sued in the District Court for the Western District of Pennsylvania, seeking a permanent injunction or a writ of mandamus to prevent DOL's administrative proceedings. The district court issued a preliminary injunction staying the administrative proceedings pending the outcome of the suit. Both parties moved for summary judgment, and the district judge assigned the case to a magistrate for a report and recommendation.

In their summary judgment memorandum, appellants contended that the DOL's proposed debarment was

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[2] Although appellants requested an oral hearing, they were not entitled to a hearing under 24 C.F.R. § 24.5(c) (1985). App. at 33a. The HUD administrative law judge therefore based his determinations on the documentary evidence and written briefs submitted by the parties.

founded on the same cause of action as the HUD debarment, and hence was barred by principles of claim preclusion. Acknowledging that the HUD debarment was based upon a conviction, and the DOL proceeding upon the underlying facts the concealment of which led to the conviction, appellants submitted that the distinction was without a difference and that the claims were essentially the same. In appellants' view DOL and HUD were privies, as agencies in the executive branch, hence, DOL's claim should have been raised in the prior debarment proceeding since otherwise the same government could repeatedly punish a contractor for the same conduct.[3] DOL, however, rejoined that the HUD disbarment had no claim preclusive effect on the DOL debarment proceeding precisely because the mail fraud conviction and the underlying regulatory violations represented different causes of action.

The magistrate began by noting that exhaustion is not required when, by not observing the principles of preclusion, " 'the challenged agency action presents a clear and unambiguous violation of statutory or constitutional rights.' " App. at 147 (quoting *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231, 245 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981). He found, however, that this case did not fall within this exception to the exhaustion doctrine. Then addressing the preclusion

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[3] Although appellants also relied upon *issue* preclusion, that doctrine would not appear apposite. Moreover, it would appear to be of doubtful utility to appellants since all the issues in the HUD debarment were decided against appellants.

issue, he determined that the HUD and the DOL debarments were different in two respects: (1) the HUD debarment was limited to HUD contracts whereas the DOL debarment would be government wide; and (2) the HUD debarment was based on appellants' criminal conviction whereas the DOL debarment would be based on the conduct underlying the mail fraud, *i.e.*, the violations of the Davis-Bacon Act. The magistrate believed that, because of these differences, the two separate agency actions arose from different causes of action and subsumed different issues, and that neither issue preclusion nor claim preclusion should apply. The magistrate therefore recommended that injunctive relief be summarily denied on the grounds that no preclusive effect exists and that, as a consequence, appellants failed to meet the requirements for the exception to the exhaustion doctrine. Adopting the magistrate's recommendation and findings, the district court granted DOL's motion for summary judgment. This appeal followed.

II.

The doctrine of exhaustion of remedies requires that parties first use all prescribed administrative measures for resolving a conflict before they seek judicial remedies. *See Myers v. Bethlehem Shipbuilding Corp.* 303 U.S. 41, 50-52 (1938). This doctrine serves judicial economy by preventing piecemeal judicial review of agency actions and facilitates judicial review by allowing the administrative tribunal to use its expertise to develop a complete factual record. *See Cerro Metal Products v. Marshall,* 620 F.2d 964, 970 (3d Cir. 1980). Further, the doctrine serves to prevent the courts from frustrating congressional decisions to

have certain disputes resolved originally in administrative forums. *See Babcock & Wilcox Co. v. Marshall*, 610 F.2d 1128, 1136 n.21 (3d Cir. 1979).

The doctrine of claim preclusion is important in the administrative as well as the judicial context, because of the "obvious principle that a controversy should be resolved once, not more than once." K. Davis, 4 *Administrative Law Treatise* § 219 (2d Ed. 1983). In general,

> [w]here an administrative forum has the essential procedural characteristics of a court . . . its determinations should be accorded the same finality that is accorded the judgment of a court. The importance of bringing a legal controversy to conclusion is generally no less when the tribunal is an administrative tribunal than when it is a court. Hence, the rule of claim preclusion is properly applied to administrative adjudications of legal claims.

Restatement (Second) of Judgment § 83 comment b (1982). Thus, there are compelling reasons for allowing the doctrine of claim preclusion to operate in administrative determinations.

We note, however, that preclusion does not apply in all administrative law cases. In *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966), the Supreme Court held that preclusion principles apply to administrative proceedings [only] when the administrative agency in the first action was "acting in a judicial capacity" and the parties had an adequate opportunity to present their case. *See also Bowen v. United States*, 570 F.2d 1311, 1320-21 (7th Cir. 1978). Moreover, we have noted

that administrative preclusion "must be tempered by fairness and equity" and is not as rigidly enforced as preclusion in judicial proceedings. *Purter v. Heckler*, 771 F.2d 682, 691 (3d Cir. 1985). Nevertheless "a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court." *Restatement (Second) of Judgments* § 83(1) (1982); *see also* K. Davis, *supra*, § 21:2 (detailing the development of administrative preclusion). Therefore, an administrative tribunal cannot refuse to observe these preclusion principles when they do apply.

In the case before us, the HUD debarment was sufficiently adjudicatory and final to enable appellants to raise a preclusion defense in the later DOL debarment. Appellants had ample notice, and they had an opportunity to present their case to the HUD ALJ in briefs and documentary evidence. Moreover, the HUD ALJ filed a detailed opinion containing his factual findings and rulings. *In re Michael Facchiano, Jr. and Facchiano Construction Co., Inc.*, HUDBCA No. 85-962-D33 (March 5, 1986). Appellants do not argue that consideration of preclusion in the administrative tribunal would lead to inequities or unfairness, and we perceive none. We thus conclude that, unless the doctrine is somehow waived, the DOL ALJ must at least consider appellants' preclusion defense, and concomitantly that the doctrine of exhaustion prevents the district court from deciding the preclusion defense in the first instance.

III.

As with many legal doctrines, the doctrine of exhaustion is not absolute. The doctrine exists within a court's discretion rather than as a strict rule of law. *See Cerro Metal Products*, 620 F.2d at 970 ("Except when required by statute, exhaustion of administrative remedies is not an inexorable command, but is a matter of sound judicial discretion"); K. Davis, *supra*, § 26:1, at 414-417. This court has developed three broad exceptions to the doctrine:

> We have declined to require exhaustion [1] when the challenged agency action presents a clear and unambiguous violation of statutory or constitutional rights, [2] when resort to administrative procedures is "clearly shown to be inadequate to prevent irreparable injury," or [3] when exhaustion is "futile."

Susquehanna Valley Alliance v. Three Mile Island, 619 F.2d 231, 245 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981) (citations omitted).[4] We address the exceptions now,

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[4] The dissent argues that exhaustion may not be required when the "issue involved is a strictly legal one, involving neither the agency's particular expertise nor its fact finding processes." *Board of Education v. Harris*, 622 F.2d 599, 607 (2d Cir. 1979), *cert. denied*, 449 U.S 1124 (1981). The case law indicates that this Court recognizes a legal question exception to the exhaustion doctrine, however, this exception is inapposite to this case, because the issue to be decided is not "strictly legal" as that term has been applied in the exhaustion cases. Two cases in this Circuit elaborate on what is meant by the legal question exception to the exhaustion doctrine. In *Bethlehem Steel Corp. EPA*, 669 F.2d 903 (3d Cir. 1982), we stated that exhaustion might not be required "where a dispute centers on legal questions such as constitutional or statutory interpretation." *Bethlehem Steel*,

except that since there is no claim of futility, we need not address that exception.

The requirement of exhaustion may be waived under the first exception in *Susquehanna* when an agency's malicious prosecution and disregard for the principles of preclusion amount to a violation of a party's due process. Appellants claim that this case falls within the due process exception to the exhaustion doctrine. They contend that they should not be required to litigate the DOL debarment in an administrative forum because the HUD debarment proceeding so clearly precludes other debarments by executive agencies.

The applicable principle is summarized by Professor Moore:

> [A] claim asserted in a subsequent proceeding is barred by the res judicata effect of a prior judgment is not itself grounds for an injunction

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669 F.2d at 907. *See also Flying Tiger Line v. Teamsters Pension Trust Fund*, 830 F.2d 1241, 1253 (3d Cir. 1987) (stating that "the requirements of the exhaustion doctrine are . . . not applicable" when the issue is one of statutory interpretation). In contrast, in this case we have a mixed question of fact and law – whether the HUD cause of action and the DOL cause of action are sufficiently similar to justify claim preclusion.

Furthermore, the body most conversant with the matter of what constitutes a debarment cause of action for DOL is DOL. Therefore, we also decline to apply this exception to this case, because DOL is more expert on this issue. *See Bethlehem Steel*, 669 F.2d at 907 ("[I]t is more desirable to let the administrative process go forward without interruption than to permit the parties to petition the courts at various intermediate stages. In that way, the agency can . . . apply any special expertise it might possess. . . . ").

> against the claimant. Vexatious, damaging or harassing potentialities of the proceeding to be enjoined must be established to authorize relief. Bad faith, if any, of the party seeking relitigation, difficulties imposed by a subsequent suit or suits on the party seeking an injunction, in the expense of time, money and energy required to defend, and the effect of continued litigation on his business or reputation, are considered by courts when asked to enjoin relitigation of matters previously adjudged.

1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.408[2] (1988) (footnotes omitted). In *Continental Can Co. v. Marshall*, 603 F.2d 590 (7th Cir. 1979), for example, the Court of Appeals enjoined the Occupational Safety and Health Review Commission ("OSHRC") from citing the Continental Can Company for noise level violations. In 1973, an administrative law judge had vacated eight OSHRC citations against Continental Can because OSHRC's interpretation of the statutory noise reduction standards was invalid. Despite this ruling OSHRC proceeded to litigate citations issued to sixteen other Continental Can plants under the same (invalid) interpretation. Since all of Continental Can's eighty plants used the same machinery as the cited plants, the court found that Continental Can faced the possibility of relitigating "the issue 'over and over in an untold number of hearings.' " *Id.* at 596 (quoting the district court). The repetitious litigation in this case, therefore, amounted to " 'harassment of a capricious kind' " and violated Continental Can's due process rights. *Id.* Since requiring Continental Can to face the administrative tribunal would only exacerbate this

unconstitutional injury, the court deemed exhaustion waived.[5]

The circumstances in *Continental Can* are distinguishable from those before us for three reasons. First, Continental Can faced the possibility of relitigating the same issue an "untold" number of times because the OSHRC ALJ refused to apply preclusion to the relitigated issue. In the case at bar, there is no indication that either HUD or DOL (or any other government agency) would pursue any debarment actions other than those already taken. Moreover, DOL's ALJ in the case at bar did not have a chance to address appellants [sic] preclusion defense before they sought injunctive relief. Second, although we intimate no view on the underlying issue, it is undoubted that this case, on its face, does not present the elements of preclusion in an aggravated form as did *Continental Can*. This case involves two different agencies pursuing two debarments differing in length and scope under two different sets of regulations. *Continental Can*, on the other hand, involved the same agency trying repeatedly to relitigate what was undoubtedly the same issue against the same company. Third, unlike the Continental Can Company, appellants lost their earlier administrative proceedings; therefore, DOL was not harassing a previously vindicated party. *See International Harvester Co. v. Occupational Safety and Health Review Commission*, 628 F.2d 982,

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[5] In *Babcock & Wilcox Co. v. Marshall*, 610 F.2d 1128, 1138 (3d Cir. 1979) (citing *Continental Can*, 603 F.2d at 596), this court recognized in dicta that exhaustion can be waived when, *inter alia*, an agency's vexatious and harassing refusal to follow issue preclusion, as in *Continental Can*, constitutes a clear and unambiguous violation of constitutional rights.

986 n.4 (7th Cir. 1980) (distinguishing *Continental Can* and finding no harassment because OSHA had not repeatedly cited Harvester for conduct that was previously found lawful).

In addition to the foregoing DOL's action does not rise to the level of vexatiousness because we cannot see, nor do appellants show us, how they will be harmed by litigating in the administrative forum. Appellants give no indication that the administrative action would impose intolerable litigation costs. *Cf. United States v. American Honda Motor Co.*, 273 F. Supp. 810, 819 (N.D.Ill. 1967) (finding repetitious litigation vexatious because it involved subpoenas calling for more than 6,000 pages of documents from all over the country).

Appellants have failed to show that the DOL debarment proceeding will amount to a clear and unambiguous violation of their statutory or constitutional rights. We find no evidence that the administrative litigation would be any more costly than the litigation before us; in fact, we think it more likely that the administrative litigation could have been more efficient and economical than appellants' pursuit of an injunction. Indeed, even if the administrative tribunal rejects the preclusion defense, it still might feel no need to impose any additional penalties on the appellant. In sum, this case does not fall within the exception to the exhaustion doctrine carved out by *Continental Can* and *Babcock* because, even if appellants have a valid claim preclusion defense, DOL's action does not amount to vexatious prosecution.

IV.

The short of it is that, rather than seeking to enjoin the DOL debarment through collateral judicial action, appellants must first try to litigate their case before an administrative officer. By seeking to injoint the administrative proceedings, appellants have closed off an efficient administrative forum in which to resolve a number of issues. Absent any indication of a due process violation or vexatious prosecution, we find no reason to frustrate the policies underlying the doctrine of exhaustion by circumventing the doctrine. We will therefore affirm the judgment of the district court insofar as it denied injunctive relief. However, because the opinion of the district court adjudicates the merits of the preclusion issue, we will vacate it so that the agency may resume its own proceedings and address the issue.

ROSENN, *Circuit Judge, dissenting*

The majority concludes that "[a]bsent any indication of due process violation or vexatious prosecution," (Maj. Op. at 14), it finds no reason to frustrate the policies underlying the doctrine of exhaustion by enjoining the Department of Labor (DOL) debarment proceedings. I believe that the exceptions to the doctrine requiring exhaustion of administrative remedies are not nearly as limited as the majority paints them, but have a much broader and more flexible range. Absent a statutory mandate for exhaustion of administrative remedies, there is no judicial justification to relegate a party to administrative procedures when the issue involved is only a legal one, requiring neither the agency's expertise nor any

factual determinations. Because that is precisely the situation in this case, I respectfully dissent.

I.

The basic premises underlying the exhaustion of administrative remedies doctrine are that (1) judicial review may be facilitated by permitting the appropriate agency to proceed without interruption to develop a factual record and apply its expertise with respect to technical subject matter, (2) administrative autonomy requires that an agency be afforded an opportunity to proceed without interference from the courts when the decision involves the exercise of discretionary powers granted by the Congress or the agency's expertise; and (3) judicial resources may be conserved should the agency grant the relief sought. *McKart v. United States*, 395 U.S. 185, 194-95 (1969).

However, the doctrine, like most judicial doctrines, is subject to numerous exceptions. *McKart*, 395 U.S. at 193. As the majority correctly observes, the exhaustion doctrine is not absolute and "exists within a court's discretion rather than as a strict rule of law." (Maj. Op. at 10). Therefore, the court should balance the goals of the doctrine against the interests of the parties.

> Except in those cases where exhaustion of administrative remedies is specifically required by statute, . . . administrative remedies need not be pursued if the litigant's interest in immediate review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further.

West v. Bergland, 611 F.2d 710, 715 (8th Cir. 1979), *cert. denied*, 449 U.S. 831 (1980). The exceptional circumstances presented by this case demand exercise of the court's discretion.

The only issue here is whether the HUD debarment had a preclusive effect on the later DOL debarment proceeding.[1] This is merely a legal question involving two government agencies, the resolution of which requires no administrative findings or expertise on the part of the DOL. The facts have been stipulated and are neither technical nor complex. Nor does resolution of the legal issue depend on the interpretation or application of the agency's own regulations. "It is well established that the courts need not defer to any agency where the issue involved is a strictly legal one, involving neither the agency's particular expertise nor its fact finding processes." *Board of Educ. v. Harris*, 622 F.2d 599, 607 (2d Cir. 1979), *cert. denied*. 449 U.S. 1124 (1981). *Accord Borden, Inc. v. FTC*, 495 F.2d 785, 787 (7th Cir. 1974); *Consumers Union of United States v. Cost of Living Council*, 491 F.2d 1396, 1399 (T.E.C.A.), *cert. denied*, 416 U.S. 984 (1974). Because the failure of the appellants to submit their preclusion claim to the administrative processes of the agency only deprive the DOL of the opportunity to decide a pure legal issue, and does not deprive it of the opportunity to speak on matters within its realm of expertise, this case should be treated as an exception to the doctrine of exhaustion.

---

[1] I agree with the majority that "the HUD debarment was sufficiently adjudicatory and final to enable appellants to raise a preclusion defense in the later DOL debarment. . . . Moreover, the HUD ALJ filed a detailed opinion containing his factual findings and rulings." Maj. op. at 9.

Moreover, resort to administrative remedies will probably only delay judicial resolution of this same issue, thereby frustrating the equally valid goals of judicial economy and expediency as well as imposing unnecessary additional expense and time on the parties. The United States District Court has already ruled on the issue and it has been briefed and orally argued on appeal. Although the DOL has the power to sustain appellants' preclusion claim, it is very unlikely that further proceedings before it would produce such a result. Inasmuch as the successful prosecution of the appellants by HUD for the underlying charges and HUD's debarment proceeding were predicated upon the DOL's own investigation, it is unlikely, in the very nature of human behavior, that the DOL will be wholly objective and impartial. When the agency has already evinced its special competence in a matter hostile to the appellants, "courts need not bow to the primary jurisdiction of the administrative body." *Board of Educ. v. Harris*, 622 F.2d at 607.

Finally, in view of the history of the previous proceedings, I believe that compelling the appellants to respond to yet another administrative proceeding, before allowing judicial determination of the legal issue, serves no purpose and is unduly harsh. The Court has recognized that, under certain circumstances, application of the exhaustion doctrine may be unacceptably harsh. In *McKart*, the petitioner had been convicted for failure to submit to induction into the Armed Forces of the United States. The district court held that the petitioner was barred from raising the defense of military exemption because he had failed to exhaust the administrative remedies provided by the Selective Service System. In holding that the failure to exhaust his administrative

remedies did not bar McKart from challenging the validity of his classification as a defense to the criminal prosecution, the Court observed that "use of the exhaustion doctrine in criminal cases can be exceedingly harsh." *McKart*, 395 U.S. at 197.

In the circumstances of this case, although civil, compelling appellants to submit to an additional agency proceeding only for a decision on a legal issue would also be harsh. The DOL completed its final investigation in 1984 but failed to initiate any debarment proceedings. Following their conviction on the basis of the DOL investigation, the individual defendants were sentenced to prison, fined, and ordered to make restitution. Appellants made restitution in the sum of $126,000 to their employees. They were then subjected to administrative proceedings by HUD and debarred. Less than three months before the HUD ALJ entered his debarment order, DOL at last decided to commence its own debarment proceeding. It now seeks to deprive appellants of a judicial inquiry. As in *McKart*, we too must ask then, "whether there is in this case a governmental interest compelling enough to outweigh the severe burden placed on [appellants]." *Id.* at 197. I see none.

Accordingly, I would decide the legal issue of claim preclusion raised on this appeal and not require exhaustion of remedies before the DOL. I therefore dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX H

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 5, 1989

Mr. Frederick J. Francis
Meyer, Unkovic & Scott
1300 Oliver Building
Pittsburgh, PA 15222

Re: Michael Facchiano, Jr., John Facchiano and Facchiano Construction Company, Inc., v. United States Department of Labor, et al. No. 88-1415

Dear Mr. Francis:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk
/s/ Joseph F. Spaniol, Jr.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3143

MICHAEL FACCHIANO, JR., JOHN FACCHIANO, and FACCHIANO CONSTRUCTION COMPANY, INC.,
Appellants

v.

THE UNITED STATES DEPARTMENT OF LABOR, THE SECRETARY OF LABOR, WILLIAM E. BROCK, in his official capacity and JAMES L. VALIN, in his official capacity,

Appellees

(D.C. Civil No. 86-2711)

SUR PETITION FOR PANEL REHEARING AND SUGGESTION FOR REHEARING IN BANC

PRESENT: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, *Circuit Judges*, and ROSENN, *Senior Judge*.*

The petition for rehearing filed by Appellants Michael Facchiano, Jr., John Facchiano and Facchiano Construction Company, Inc., having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service,

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* As to panel rehearing only.

and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT,

/s/ Edward R. Becker
Circuit Judge

DATED: November 22, 1988

APPENDIX J

UNITED STATES OF AMERICA

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

BOARD OF CONTRACT APPEALS

WASHINGTON, D. C.

In the Matter of:	HUDBCA No. 85-962-D33
MICHAEL FACCHIANO, JR. and FACCHIANO CONSTRUCTION CO., INC.,	(Docket No. 85-1019-DB)
Respondents	

Thomas A. Berrett, Esquire
Meyer, Unkovic & Scott
1300 Oliver Building
Pittsburgh, Pennsylvania 15222

Helen Honorow, Esquire
Office of General Counsel
U.S. Department of Housing
and Urban Development
Washington, D.C. 20410

DETERMINATION

Statement of the Case

By letter dated May 15, 1985, Alfred C. Moran, Assistant Secretary for Community Planning and Development, U.S. Department of Housing and Urban Development ("HUD") notified Michael Facchiano, Jr.

("Facchiano" or "Respondent") and Facchiano Construction Co., Inc. ("Facchiano Construction," "company," or "Respondents") that, pursuant to 24 C.F.R. §24.6(a)(9), HUD was considering debarring Respondents from further participation in HUD programs for a period of three years. The proposed debarments were based on Respondents' convictions in by the U.S. District Court for the Western District of Pennsylvania for violations of Title 18 U.S.C. §§241 and 2 (Mail Fraud). Pending resolution of the debarment action, Respondents were suspended from further participation in HUD programs. Respondents made a timely request for an opportunity to submit documentary evidence and written briefs pursuant to 24 C.F.R. §24.5(c)(2). Respondents also requested an oral hearing on the proposed debarment.

Findings of Facts

1. Facchiano Construction is a Pennsylvania corporation engaged in the cement and construction business. (Respondents' Brief, at 1.) Facchiano is the secretary of Facchiano Construction and, at relevant times, was responsible for the certification of the company's wage and payroll records. (Respondents' Brief, at 2.)

2. Respondents are direct recipients of HUD funds (Respondents' Brief, at 2). As such, they are contractors or grantees as defined by 24 C.F.R. §24.4(f).

3. Respondents were involved in the performance of several HUD assisted contracts which required, in pertinent part, that individuals employed as laborers and mechanics be paid prevailing wage rates as determined by the Secretary of Labor, pursuant to HUD regulations

and the Davis-Bacon Act, 40 U.S.C. §276(a) [sic] *et seq.* Respondents were required under the terms of these contracts to certify that these individuals had been paid the predetermined prevailing wage rates. (Govt. Brief, at 2; Govt. Exh. E.)

4. In the summer of 1984, the Department of Labor conducted an investigation of Respondents' employment practices and concluded that Respondents were in violation of the requirements of the Davis-Bacon Act. The investigation revealed that Respondents had submitted false payroll certifications stating that the required wages had been paid when, in fact, they had not. (Respondents' Brief, at 2-3.) Based upon the submission by Respondents of false payroll certifications over a period from about January 1, 1982 to about October 4, 1984, the Department of Labor determined that Respondents' employees had been defrauded of $126,298.27. These false payroll certifications were mailed through the U.S. Postal Service to the United States or its agent. (Resp. Exhs., at 10a-15a.)

5. The Department of Labor referred the matter to the U.S. Attorney for the Western District of Pennsylvania and the Respondents were criminally charged in an Information filed January 24, 1985 with the U.S. District Court for the Western district of Pennsylvania. (Respondents' Brief, at 3; Govt. Exh. E.) On February 22, 1985, pursuant to a plea bargaining agreement, Respondents pleaded guilty to two counts of mail fraud in violation of 18 U.S.C. §§1341 and 2. The company was fined $1,000 on each count. On count 1, Facchiano was given a 6-month prison sentence and fined $1,000. On count 2, Facchiano was fined another $1,000 and sentenced to a 5-year probation period. (Govt. Exh. C.)

6. Prior to the sentencing, Respondents made restitution of the unpaid wages to past and present employees in an amount in excess of $120,000. (Resp. Brief, at 12; Resp. Exhs., at 29a.) The terms of the plea bargaining agreement required Respondents to cooperate fully with the Department of Labor and the U.S government in its investigations. (Resp. Exhs., at 28a.) Respondents have complied with the terms of the plea agreement and have cooperated with the U.S. Government in its investigations. (Respondents' Brief at 5, 11-12.)

7. Since the investigation of the company by the Department of Labor, the company has taken steps designed to prevent recurrences of violations of law. The company created and filled a position of Office Manager/Project Manager, the duties of which include monitoring all the company's federally funded paperwork, including payroll sheets, in order to assure compliance with state and federal laws and regulations. This position was created with the primary responsibility of directing and reviewing compliance with all applicable laws, and insuring that no violation of federal or state law would occur. (Respondents' Brief, at 5-6; Resp. Exhs., at 72a, 123a.) The company has also distributed a manual to its employees to inform them of their rights and responsibilities as employees of the company and to advise them of certain wage rates. (Respondents' Brief, at 6; Resp. Exhs., at 127a.)

Discussion

Respondents' request for an oral hearing is governed by the application of 24 C.F.R. §24.5(c)(2). Under this

regulation, when a proposed debarment is based on a conviction, a hearing on the proposed debarment is limited to the submission of documentary evidence and written briefs. *See Roy C. Markey/The Roary Co./Be-Mark Homes*, HUDBCA 82-712-D33, 82-2 BCA ¶16,120 (denial of motion for oral hearing); *Leonardo Leon Collazo*, HUDBCA 86-987-D2 (November 22, 1985) (denial of request for oral hearing). Consequently, Respondents are not entitled to an oral hearing and their request for an oral hearing is denied.

Debarment is one of the most serious sanctions which the Department can impose upon a contractor. The purpose of debarment is to assure that the Department only does business with responsible contractors and grantees. 24 C.F.R. §24.0. It is a measure to be invoked for the purpose of protecting the public, and is not a measure to be imposed for punitive purposes. 24 C.F.R. §24.5(a). Responsibility is a term of art in Government contract law. It concerns the integrity and honesty of a contractor or grantee as much as his ability to satisfactorily perform the actual work of a contract or grant. *Norman D. Wilhelm*, HUDBCA 82-679-D15 (Aug. 27, 1983). Present lack of responsibility may be inferred from past acts. *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957).

Respondents were convicted for knowingly, willfully and unlawfully using the U.S. Postal Service for the purpose of executing a scheme to defraud their employees and the United States. Respondents' criminal acts are grounds for debarment under HUD regulations. 24 C.F.R. §24.6(a)(1), (4) and (9). The fact that cause for debarment is established, however, does not necessarily require that

Respondents be excluded from participation in Departmental programs. 24 C.F.R. §24.6(b)(1). Mitigating factors must be considered in determining whether the sanction is necessary to protect the public interest and is in the best interest of the Government. *Roemer v. Hoffman*, 419 F. Supp. 130 (D.C. D.C. 1976).

Respondents argue that despite their conviction, they are presently responsible contractors, and that debarment is not warranted in this case in order to protect the interests of the public or the Government. Mitigating factors averred by the Respondents include their cooperation with the U.S. Government, the complete financial restitution to underpaid employees, the fact that there are no prior convictions, evidence of good character, measures taken by Respondents to avoid recurrences of improper conduct and to assure full compliance with federal regulations, and the deterrent effect of the sentence and the probation period. Respondents submitted copies of over forty letters from friends, neighbors, employees, business associates and public officials in support of Facchiano which were sent to the U.S. District Court in February 1985. These letters generally portray Facchiano as a forthright and reliable man who made a serious error of judgment.

The Government contends that Respondents' arguments and submissions are neither valid no sufficient mitigating factors. The Government argues that Respondents' positive acts subsequent to the discovery of their criminal conduct were intended basically to mitigate the sentence of the U.S. District Court in the criminal proceeding. The Government also submitted a letter from the

Director of Allegheny County Department of Development who asserted that the underpayments were most serious and that Respondents' disregard for federal law created a serious doubt as to their responsibility.

Although many of the letters submitted by the Respondents attest to Facchiano's good character, the Respondents' criminal actions were, nevertheless, deliberate, elaborate and repeated. The illegal conduct continued for thirty-three months until the Government intervened. This prolonged and repeated conduct cannot be viewed was a mere aberration of character, nor was the cessation of this criminal behavior due to a voluntary change of heart. The serious crimes committed by Respondents resulted in depriving their employees of $126,298.27. Equally deplorable was Respondents' corruption of the Department's program by creating a scheme to subvert HUD policies and regulations. To participate in such an obviously offensive and illegal practice required a state of mind which believed that laws could be broken with impunity.

In his efforts to rehabilitate the company and himself, Facchiano has accepted responsibility for his actions, and the company has made restitution to all the employees affected. The record presents no evidence of substantial personal or corporate sacrifice in order to make the restitution, and the Government's argument that restitution merely returned money to employees which Respondents had illegally withheld and that restitution was a factor in mitigating the Respondents' sentences in the U.S. District Court proceedings is well taken. Nevertheless, Respondents' willingness to accept responsibility and to make

payment in restitution are positive acts which can be considered in mitigation.

At least two significant steps were taken by Respondents to prevent future violations to federal regulations. Respondents promulgated an Employee Handbook outlining the rights and responsibilities of employees of Facchiano Construction. Of particular relevance is paragraph 5 in the employment section of the handbook (Resp. Exh., at 132a) which states:

> (5) Each Employee has his own standard hourly rate. In these circumstances in which a different, higher rate is applicable due to the particular legal or contractual requirements of a contract, each Employee will be paid the higher rate dependent upon his classification. Job notices will be posted on those projects in which higher rates are to be paid. Employees are encouraged to inquire as to whether the higher rate is applicable. Employees are also encouraged to advise the company if, in the Employee's opinion, the classification of work which they are performing is different from their actual job classification.

In educating their employees, Respondents demonstrate a sincere effort toward the prevention of future violations. A meaningful application of the handbook provisions should encourage management and employees alike to be mindful of proper labor practices. *See Milo L. Pike, Pike Industries, Inc., and Bruce A. Homer*, HUDBCA 84-885-D41 and 84-886-D42, at 4.

A second significant step toward the prevention of further violations of federal law and regulations was the

establishment of a new position of Office Manager/Project Manager. The ostensibly positive effect of this position may be subject to scrutiny because there is no evidence that this position is not subordinate to or under Facchiano's direct control. It would have been a more meaningful signal if there was evidence in the record that this newly created position could function with complete organizational independence.

Although complete cooperation with the U.S. Government was required by the terms of the plea agreement and Respondents have benefited from this cooperation, I am persuaded that the Respondents' conduct as contractors prior to the occurrence of the criminal actions and the Respondents' professional conduct since the commission of these criminal acts are significant factors which reflect favorably on the question of Respondents' present responsibility. *Roemer v. Hoffman, supra.* Facchiano appears to be sincere in his commitment to keep himself and his company on the path of compliance with federal law and the regulations governing the performance of federally assisted contracts. *See Norman D. Wilhelm,* HUDBCA 82-679-D15, 82-2 BCA ¶16,002 (contractor no longer a threat to HUD programs).

While I am convinced that a period of debarment of the Respondents is warranted, I find that a period of debarment of eighteen months is sufficient to protect the interest of the public and the Department. This period should also provide sufficient time for the company's new Office Manager/Project Manager to prove his usefulness and effectiveness in overseeing the company's compliance with governmental regulations and those contract requirements which affect employee rights.

ORDER

It is hereby ordered that MICHAEL FACCHIANO, JR. and FACCHIANO CONSTRUCTION CO., INC., be debarred for a period of eighteen months until November 15, 1986, credit being given for the period of suspension since May 15, 1985.

/s/ David T. Anderson
DAVID T. ANDERSON
Administrative Judge

March 5, 1986

APPENDIX K

REORGANIZATION PLAN NO. 14 OF 1950, as amended, 5 U.S.C. App 1

Eff. May 24, 1950, 15 F.R. 3176, 64 Stat. 1267.

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, March 13, 1950, pursuant to the provisions of the Reorganization Act of 1949, approved June 20, 1949 [see section 901 et seq. of this title].

LABOR STANDARDS ENFORCEMENT

In order to assure coordination of administration and consistency of enforcement of the labor standards provisions of each of the following Acts by the Federal agencies responsible for the administration thereof, the Secretary of Labor shall prescribe appropriate standards, regulations, and procedures, which shall be observed by these agencies, and cause to be made by the Department of Labor such investigations, with respect to compliance with and enforcement of such labor standards, as he deems desirable, namely: (a) The Act of March 3, 1931 (46 Stat. 1494, ch. 411), as amended [sections 276a to 276a-6 of Title 40]; (b) the Act of June 13, 1934 (48 Stat. 948, ch. 482) [section 276c of Title 40]; (c) the Act of August 1, 1892 (27 Stat. 340, ch. 352), as amended [sections 321-323 of Title 40]; (d) the Act of June 19, 1912 (37 Stat. 137, ch. 174), as amended [sections 324 and 325 of Title 40]; (e) the Act of June 3, 1939 (53 Stat. 804, ch. 175), as amended [sections 1703, 1708-1711, 1713, 1715c, 1716 of Title 12]; (f) the Act of August 13, 1946 (60 Stat. 1040, ch. 958 [sections

291-291m of Title 42]; (g) the Act of May 13, 1946 (60 Stat. 170, ch. 251), as amended [sections 1101-1119 of Title 49]; (h) the Airport and Airway Development Act of 1970 [section 1701 et seq. of Title 49]; and (i) the Act of July 15, 1949 (ch. 338, Public Law 171, Eighty-first Congress, first session [sections 1416, 1451-1460 of Title 42]) [Amended Pub.L. 91-258, Title I, § 52(b)(7), May 21, 1970, 84 Stat. 235.]

* * *

DAVIS-BACON ACT, 40 U.S.C. § 276a, *et seq.*

* * *

§ 276a-1. Termination of work on failure to pay agreed wages; completion of work by Government

Every contract within the scope of sections 276a to 276a-5 of this title shall contain the further provision that in the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and to prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

§ 276a-2. Payment of wages by Comptroller General from withheld payments; listing contractors violating contracts

(a) The Comptroller General of the United States is authorized and directed to pay directly to laborers and mechanics from any accrued payments withheld under the terms of the contract any wages found to be due laborers and mechanics pursuant to sections 276a to 276a-5 of this title; and the Comptroller General of the United States is further authorized and is directed to distribute a list to all departments of the Government giving the names of persons or firms whom he has found to have disregarded their obligations to employees and subcontractors. No contract shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have an interest until three years have elapsed from the date of publication of the list containing the names of such persons or firms.

* * *

40 U.S.C. § 276c. Regulations governing contractors and subcontractors

The Secretary of Labor shall make reasonable regulations for contractors and subcontractors engaged in the construction, prosecution, completion or repair of public buildings, public works or buildings or works financed in whole or in part by loans or grants from the United States, including a provision that each contractor and subcontractor shall furnish weekly a statement with respect to the wages paid each employee during the

preceding week. Section 1001 of Title 18 shall apply to such statements.

* * *

CONTRACT WORK HOURS AND SAFETY STANDARDS ACT, 40 U.S.C. § 327, *et seq.*

* * *

§ 328. Forty hour week; overtime compensation; contractual conditions; liability of employers for violations; withholding funds to satisfy liabilities of employers

(a) Notwithstanding any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor in his performance of work on any contract of the character specified in section 329 of this title shall be computed on the basis of a standard workweek of forty hours, and work in excess of such standard workweek shall be permitted subject to provisions of this section. For each workweek in which any such laborer or mechanic is so employed such wages shall include compensation, at a rate not less than one and one-half times the basic rate of pay, for all hours worked in excess of forty hours in the workweek.

* * *

§ 329. Contractors subject to this subchapter; workers covered; exceptions

(a) the provisions of this subchapter shall apply, except as other wise [sic] provided, to any contract which may require or involve the employment of laborers or mechanics upon a public work of the United States, of any territory, or of the District of Columbia, and to any

other contract which may require or involve the employment of laborers or mechanics if such contract is one (1) to which the United States or any agency or instrumentality thereof, any territory, or the District of Columbia is a party, or (2) which is made for or on behalf of the United States, any agency or instrumentality thereof, any territory, or the District of Columbia, or (3) which is a contract for work financed in whole or in part by loans or grants from, or loans insured or guaranteed by, the United States or any agency or instrumentality thereof under any statute of the United States providing wage standards for such work: *Provided*, That the provisions of section 328 of this title, shall not apply to work where the assistance from the United States or any agency or instrumentality as set forth above is only in that nature of a loan guarantee, or insurance. Except as otherwise expressly provided, the provisions of this subchapter shall apply to all laborers and mechanics, including watchmen and guards, employed by any contractor or subcontractor in the performance of any part of the work contemplated by any such contract, and for purposes of this subchapter, laborers and mechanics shall include workmen performing services in connection with dredging or rock excavation in any river or harbor of the United States or of any territory or of the District of Columbia, but shall not include any employee employed as a seaman.

* * *

HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974, 42 U.S.C. § 5301, *et seq.*, and 42 U.S.C. § 1437, *et seq.*

* * *

§ 5310. Labor standards; rate of wages; exceptions; enforcement powers

(a) All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a-276a-5): *Provided*, That this section shall apply to the rehabilitation of residential property only if such property contains not less than 8 units. The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of Title 40.

* * *

42 U.S.C. § 1440. State housing finance development agencies

* * *

Labor Standards

(g) All laborers and mechanics employed by contractors or subcontractors in housing or development activities assisted under this section shall be paid wages at rates not less than those prevailing on similar work in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended: *Provided*, That this section shall apply to the construction of residential property only if such property is designed for residential use for eight or more families. No assistance

shall be extended under this section with respect to any development activities without first obtaining adequate assurance that these labor standards will be maintained upon the work involved in such activities. The Secretary of Labor shall have, with respect to the labor standards specified in this subsection, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950, and section 276c of Title 40.

* * *

DEPARTMENT OF LABOR, LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION, 29 C.F.R. § 5.1, *et seq.*

* * *

§ 5.12 Debarment proceedings.

(a)(1) Whenever any contractor or subcontractor is found by the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of any of the applicable statutes listed in § 5.1 other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed 3 years (from the date of publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list as provided below) to receive any contracts or subcontracts subject to any of the statutes listed in § 5.1.

(2) In cases arising under contracts covered by the Davis-Bacon Act, the Administrator shall transmit to the

Comptroller General the names of the contractors or subcontractors and their responsible officers, if any (and any firms in which the contractors or subcontractors are known to have an interest), who have been found to have disregarded their obligations to employees, and the recommendation of the Secretary of Labor or authorized representative regarding debarment. The Comptroller General will distribute a list to all Federal agencies giving the names of such ineligible persons or firms, who shall be ineligible to be awarded any contract or subcontract of the United States or the District of Columbia and any contract or subcontract subject to the labor standards provisions of the statutes listed in § 5.1.

* * *

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEBARMENT, SUSPENSION AND INELIGIBILITY OF CONTRACTORS AND GRANTEES; ADMINISTRATIVE SANCTIONS, 24 C.F.R. § 24.0, *et seq.* (1985)

* * *

§ 24.4 Definitions.

(a) "Debarment" means, exclusion from a participation in HUD programs for a reasonable, specified period of time commensurate with the seriousness of the offense or the failure or inadequacy of performance generally not to exceed five years. However, the hearing officer may exclude a party for an indefinite period because of egregious and willful improper conduct. Debarment also means exclusion from participation by reason of ineligibility under regulations of the Secretary of Labor pursuant to Executive Order 11246, which exclusion

continues pending elimination of the circumstances for which it was imposed.

* * *

§ 24.5 General.

(a) Debarment, suspension, placement in an ineligible status, temporary denial of participation and conditional participation are measures which may be invoked by offices of the Department either to exclude or to disqualify contractors and grantees from participation in Department programs. These measures shall be used for the purpose of protecting the public and are not for punitive purposes.

* * *

§ 24.6 Causes and conditions applicable to determination of debarment.

Subject to the following conditions, the Department may debar a contractor or grantee in the public interest for any of the following causes:

(a) *Causes.* (1) Conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract, or subcontract thereunder, or in the performance of such contract or subcontract.

* * *

(4) Any other cause of such serious compelling nature, affecting responsibility, as may be determined by the appropriate Assistant Secretary, to warrant debarment.

* * *

(6) Making or procuring to be made any false statement for the purpose of influencing in any way the action of the Department.

* * *

(9) Conviction under the Organized Crime Control Act of 1970, 18 U.S.C. 1961, et seq. or conviction for the commission of the offense of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, fraudulent use of the mail in connection with commission of such offenses, or conviction for any other offense indicating a lack of business integrity or honesty, which seriously and directly affects the question of present responsibility.

* * *

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No. 92-1944

In the Supreme Court of the United States

OCTOBER TERM, 1993

FACCHIANO CONSTRUCTION CO., ET AL., PETITONERS

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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23 pp

QUESTION PRESENTED

Whether the court of appeals erred in upholding the Department of Labor's order debarring Facchiano Construction Company, Michael Facchiano, Jr., and John Facchiano from contracting with the federal government for three years based on their violations of labor standards under Davis-Bacon Related Acts.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 987 F.2d 206. The opinion and order of the district court (Pet. App. 21-34) are unreported. The decision of the United States Wage Appeals Board (Pet. App. 35-54) and the decision and order of the administrative law judge (Pet. App. 55-82) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1993. The petition for a writ of certiorari was filed on June 7, 1993 (a Monday). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. An investigation by the Department of Labor (DOL) and the Federal Bureau of Investigation revealed that, between 1982 and 1984, petitioner Facchiano Construction Company paid wages for work done on construction projects financed by the Department of Housing and Urban Development (HUD) at rates below those required by the Housing and Community Development Act of 1974 (HCDA), 42 U.S.C. 5301, 5310, and the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. 327 *et seq.*, two of the Davis-Bacon Related Acts.[1] Pet. App. 3-4. The investigation also revealed that the company's payrolls, which had been certified as correct by petitioner John Facchiano, stated that employees received a higher wage than was actually paid, that employees were misclassified, that overtime hours were underpaid, that employees were not paid for all the hours that they worked, and that the names of certain employees had been omitted. *Id.* at 3 n.2, 38.

As a result of that investigation, Facchiano Construction Company paid more than $128,000 in back wages and benefits to 20 employees. Pet. App. 38. Additionally, a two-count criminal information was filed against the company and petitioner Michael Facchiano, Jr., the company secretary. Both defendants ultimately entered pleas of guilty to mail fraud in violation of 18 U.S.C. 1341 for their conduct in

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[1] The Davis-Bacon Related Acts set forth labor standards requirements under some 60 federal statutes administered by federal agencies. See 29 C.F.R. 5.1.

sending falsified payroll statements through the mail.[2]

Thereafter, HUD filed an administrative complaint against the company and Michael Facchiano, Jr., seeking to debar them from participating in any HUD-funded programs pursuant to 24 C.F.R. 24.6 (1985). Pet. App. 4. After determining that the convictions for mail fraud constituted grounds for debarment under HUD regulations, HUD's Board of Contract Appeals considered certain mitigating evidence in determining the appropriate sanction. *Id.* at 120-124. Based on its review of the documentary evidence and briefs, the Board then ordered the debarment of the company and Michael Facchiano, Jr., from participation in HUD programs for 18 months.[3] *Id.* at 124-125. The debarment period ended on November 15, 1986. *Id.* at 125.

2. During the pendency of the HUD debarment proceeding, DOL commenced its own proceeding, pursuant to 29 C.F.R. 5.12(a)(1) (1986), to debar the company, Michael Facchiano, Sr., Michael Facchiano, Jr., and John Facchiano from contracting with the federal government as a whole. Pet. App. 4.[4]

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[2] Michael Facchiano, Jr., was sentenced to six months' imprisonment and a five-year period of probation, and was fined $2,000. The company was also fined $2,000. Pet. App. 38.

[3] The HUD Board denied the company's and Facchiano's request for an oral hearing, noting that when a HUD debarment is based on a criminal conviction, the Board must make its decision based exclusively on the documentary evidence and briefs. Pet. App. 119-120, citing 24 C.F.R. 24.5(c)(2) (1985).

[4] After the HUD debarment, petitioners brought suit in federal district court seeking to enjoin the DOL's debarment action on the ground that it was precluded by principles of res judicata and collateral estoppel. Pet. App. 4. The district

Following an administrative hearing, the ALJ debarred the company from participating in any government contracts for a period of 18 months. Pet. App. 55-82.

The ALJ rejected petitioners' claim that DOL's debarment proceeding was barred by the doctrines of res judicata and collateral estoppel by virtue of HUD's earlier debarment proceeding. Pet. App. 74-77. The ALJ relied in part on the fact that the HUD debarment related only to HUD projects, while the DOL debarment would have government-wide effect. *Id.* at 76-77. The ALJ also relied on the fact that the HUD debarment was based on the criminal convictions of the company and Michael Facchiano, Jr., while the DOL debarment would be based directly on petitioners' violations of the Davis-Bacon Related Acts. *Ibid.*

The ALJ further found that the company had committed aggravated and willful violations of the HCDA and CWHSSA, and that debarment was therefore appropriate. Pet. App. 79-80. The ALJ ruled that the individual officers of the company—petitioners Michael Facchiano, Sr., Michael Facchiano, Jr., and John Facchiano—were not subject to debarment, because the applicable regulation authorized debarment only of a "contractor or subcontractor," not "contractors or subcontractors and their responsible

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court held that collateral estoppel and res judicata did not apply, and granted summary judgment for DOL. *Id.* at 83-93. Citing petitioners' failure to exhaust their administrative remedies, the court of appeals affirmed the district court's judgment. *Id.* at 94-112. The court vacated the district court's ruling on the preclusion issue, however, in order to permit DOL to address that issue in the first instance. *Id.* at 108.

officers," as under the regulation applicable to debarment under the Davis-Bacon Act. 29 C.F.R. 5.12(a)(1) and (2) (1986); see Pet. App. 77-79. The ALJ recognized, however, that a debarment order would not "be of any real effect" unless it was directed against the individual petitioners, because the company was already inactive. *Id.* at 77.

3. The Wage Appeals Board affirmed in part and reversed in part. Pet. App. 35-54. First, the Board agreed with the ALJ that the principle of res judicata did not preclude the DOL debarment proceeding. *Id.* at 43-50. The Board considered critical the fact that "it is the Secretary of Labor, and not HUD, who has primary responsibility for enforcing the labor standards requirements of * * * the HCDA and the CWHSSA and for determining whether government-wide debarment is warranted for violations of those requirements." *Id.* at 44-45. The Board also relied on the facts that (1) the DOL debarment, unlike the HUD debarment, was government-wide, and (2) the DOL debarment was based on the labor standards violations themselves, whereas the HUD debarment was based primarily on the criminal convictions. *Id.* at 45. In the Board's view, those distinctions demonstrated that the HUD and DOL proceedings did not involve the same cause of action. *Ibid.*[5]

The Board reversed the ALJ's holding that debarment of the individual petitioners was not permissible under the DOL regulations governing Davis-Bacon Related Acts debarments. Pet. App. 46-50. The Board

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[5] The Board found that petitioners had not raised a claim of collateral estoppel, but noted that, in any event, its rejection of the claim of res judicata would also apply to a claim of collateral estoppel. Pet. App. 43 n.1.

rejected the notion that the plain language of 29 C.F.R. 5.12(a)(1) (1986) precludes debarment of corporate officers merely because it authorizes debarment of any "contractor or subcontractor" without referring specifically to corporate officers as well. Pet. App. 48. The Board found that other procedural debarment provisions referring specifically to "persons" and "responsible officers" supported the Secretary's reading of Section 5.12(a)(1). Pet. App. 48-49, citing 29 C.F.R. 5.12(b)(1) and (c), 6.2(d). The Board also relied on the remedial purposes of the Related Acts debarment regulation, noting that the debarment procedure would be "robb[ed] * * * of its effectiveness" if it were construed to preclude debarment of responsible individuals. Pet. App. 50. Accordingly, the Board adhered to its consistent interpretation of the regulation as permitting debarment of responsible officials in appropriate cases. *Ibid.*

The Board also reversed the ALJ's decision to impose only an 18-month debarment. The Board found that a full three-year debarment of all petitioners was appropriate in light of the absence of any extraordinary circumstances that would dictate a shorter period. Pet. App. 50-52.[6]

4. Petitioners then brought suit in federal district court seeking to enjoin the DOL debarment and reverse the decision of the Wage Appeals Board. The district court granted summary judgment in favor of DOL and affirmed the decision of the Board in its entirety. Pet. App. 21-34.

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[6] One board member dissented from that conclusion, reasoning that an additional three-year debarment was inappropriate in light of the previous 18-month HUD debarment. Pet. App. 53-54.

5. The court of appeals affirmed in pertinent part. Pet. App. 1-20. The court rejected petitioners' contention that res judicata and collateral estoppel precluded DOL's debarment proceeding. *Id.* at 9-14. Citing *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 402 (1940), the court found that DOL and HUD were not in privity during their respective debarment proceedings for purposes of res judicata principles. Pet. App. 10. The court explained that, under *Sunshine Coal*, the critical issue is the authority delegated to each agency to bind the government in a final adjudication. Pet. App. 10-11. The court then determined that HUD had no authority to debar contractors from participating in any non-HUD federal contracting programs or to debar contractors based on Related Acts labor violations. *Id.* at 11-12. DOL, on the other hand, possessed authority to debar contractors from all federal programs based on Related Acts violations. *Id.* at 12. Thus, the court concluded that HUD's debarment action did not preclude DOL's subsequent action, because HUD "did not have 'authority to represent [the United States'] interests in a final adjudication of the issue in controversy.'" *Id.* at 12-13, quoting *Sunshine Coal*, 310 U.S. at 403.

Furthermore, the court found that DOL's and HUD's causes of action were not the same for purposes of res judicata, nor were the issues identical for purposes of collateral estoppel. Pet. App. 13. The court noted that the HUD proceeding was based on the criminal conviction of Michael Facchiano, Jr., while the DOL proceeding also debarred Michael Facchiano, Sr., and John Facchiano, based on their own aggravated and willful violations of labor

standards requirements. *Ibid.* Moreover, the court emphasized that the two proceedings were based on different statutes and different material facts and evidence, and that the demand for recovery in each proceeding was different. *Id.* at 13-14.

Finally, the court affirmed the district court's conclusion that debarment of individuals is authorized by 29 C.F.R. 5.12(a)(1) (1986). Pet. App. 14-17. Noting that an agency's interpretation of its own regulation is entitled to substantial deference, the court found "no error in DOL's interpretation that § 5.12(a)(1) includes debarment of individual responsible officers." *Id.* at 15. The court explained that the Wage Appeals Board has consistently interpreted the regulation to permit debarment of responsible officers, and concluded that the Board's interpretation was reasonable in light of the remedial goals of the Related Acts. *Id.* at 16. The court acknowledged that the Davis-Bacon Act debarment regulation specifically mentions "responsible officers" while the Related Acts regulation does not, but declined to place any weight on that difference in language because the two regulations were not drafted at the same time. Pet. App. 17. Moreover, the court observed that it could "discern no rational reason for including debarment of responsible officers in one regulation, but not the other." *Id.* at 16. Accordingly, the court affirmed the DOL debarment of the company and its responsible officers for knowingly violating Related Acts labor standards.[7]

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[7] The court also rejected petitioners' argument that Executive Order No. 12,549, 3 C.F.R. 189 (1987), which provides that debarment under any federal program will have government-wide effect, precluded DOL from debarring

ARGUMENT

The court of appeals, applying the principles established in this Court's decision in *Sunshine Coal*, correctly held that neither res judicata nor collateral estoppel precluded DOL from ordering debarment of petitioners. The court also properly held that DOL regulations allow the debarment of individual responsible officers. Those holdings do not conflict with any decision of this Court or of any other court of appeals, and they present no issue of general or continuing importance warranting review by this Court.

1. Petitioners contend (Pet. 10-18) that DOL was precluded by the doctrine of res judicata from debarring them, following the prior HUD debarment of the Facchiano Construction Company and Michael Facchiano, Jr. That contention is without merit.

The doctrine of res judicata "precludes the parties or their privies from relitigating issues that were or could have been raised" in a previous action. *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981). Thus, a final judgment on the merits bars further claims by parties or their privies on the same

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petitioners from all government contracts after HUD had debarred the company and Michael Facchiano, Jr., only with respect to HUD projects. The court explained that the Executive Order provides no private right of action and did not become effective until long after DOL had begun its proceedings. Pet. App. 5-9. The court agreed, however, that the record was insufficient to support the Wage Appeals Board's debarment of Michael Facchiano, Sr. *Id.* at 17-19. Accordingly, the court vacated the district court's ruling on that issue and remanded for further proceedings. Petitioners do not challenge those aspects of the court of appeals' decision in this Court.

cause of action. *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979).

The doctrine of res judicata applies to administrative decisions when "an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). In the administrative context, as elsewhere, however, the crucial questions for purposes of res judicata are whether there is privity between the parties in the two proceedings against whom the doctrine is being asserted, and whether the second suit is based on the same cause of action as the first. See *Nevada* v. *United States*, 463 U.S. 110, 129-130 (1983); *Sunshine Coal*, 310 U.S. at 402. Here, the court of appeals correctly held that HUD and DOL were not privies with regard to their respective debarment actions, and that the DOL debarment action was not based on the same cause of action as the HUD proceeding.

a. In *Sunshine Coal*, this Court set forth the test for determining whether two government agencies are in privity for purposes of res judicata. In that case, the appellant originally sought a determination from the National Bituminous Coal Commission that the appellant was exempt from a federal excise tax because its coal was not "bituminous" within the meaning of the relevant statute. 310 U.S. at 390. The Commission denied the exemption on the ground that the appellant's coal was bituminous, and that determination was upheld on appeal. *Id.* at 390-391.

In the meantime, the Collector of Internal Revenue sought payment of the taxes, and the appellant filed

suit in federal court seeking to enjoin collection of the taxes. 310 U.S. at 391. In considering whether the prior determination that the appellant's coal was bituminous was binding in the second action, this Court looked to whether privity existed between the Commission and the Collector of Internal Revenue. *Id.* at 402-403. The Court described the test for determining privity between federal agencies as follows: "The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy." *Id.* at 402-403. Applying that test to the circumstances before it, the Court found that the Commission had clear authority "to make the determination of the status of [the] appellant's coal under the Act." *Id.* at 403. Accordingly, the Court concluded that the Commission "represented the United States in that determination," and thus the first proceeding "bound the United States, as well as the appellant." *Ibid.*

In this case, by contrast, HUD did not have full authority to represent the interests of the United States in a final adjudication of all issues relating to petitioners' debarment. As the court of appeals correctly observed (Pet. App. 11-12), HUD lacked authority to debar contractors from non-HUD programs[8] or to debar contractors for Related Acts

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[8] At the time of the HUD debarment proceeding, HUD's debarment regulations defined "Debarment" as "exclusion from a participation in HUD programs for a reasonable, specified period of time." 24 C.F.R. 24.4(a) (1985) (Pet. App. 133); see also 24 C.F.R. 24.5(a) (1985) (Pet. App. 134).

labor violations.[9] Rather, that authority rested with DOL. See 29 C.F.R. 5.12(a)(1). Thus, because the "issue in controversy" in the DOL proceeding was whether petitioners should be debarred from participating in all government contracts based on their violations of the labor standards provisions of the HCDA and the CWHSSA, "HUD, even though it acted as a representative of the United States, did not have 'authority to represent [the United States'] interests in a final adjudication of the issue in controversy'" in the DOL proceeding. Pet. App. 12-13, quoting *Sunshine Coal*, 310 U.S. at 403.

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[9] Instead, the grounds for debarment under HUD's regulations included: conviction of a criminal offense committed as an incident to obtaining or performing under the contract; conviction of certain specified crimes, including mail fraud; violation of contract provisions; and any other causes that were of "such serious compelling nature, affecting responsibility," as "to warrant debarment." 24 C.F.R. 24.6 (1985); see Pet. App. 134.

We note, however, that HUD's debarment regulations have since been substantially revised in response to Executive Order No. 12,549, *supra*, which directed each Executive agency to participate in and implement a government-wide system for nonprocurement debarment and suspension. 24 C.F.R. 24.100; see generally *id.* §§ 24.100-24.510. Accordingly, if petitioners had been debarred by HUD after October 1, 1988 (the effective date of the revised regulations), the HUD debarment would have had government-wide effect, *id.* §§ 24.100(a), 24.200(a), and such debarment could have been based directly on a willful violation of the Davis-Bacon Related Acts labor standards, see 24 C.F.R. 24.305(b)(3). Under the revised regulations, moreover, "[w]hen more than one agency has an interest in the proposed debarment or suspension of a person, consideration shall be given to designating one agency as the lead agency for making the [debarment] decision." *Id.* § 24.115(c). Thus, as a practical matter, the preclusion issue on which petitioner seeks review in this case is not likely to recur.

Petitioners err in contending (Pet. 13-14) that DOL and HUD were in privity because HUD's debarment order was issued pursuant to its shared responsibility for enforcing federal labor standards under Reorganization Plan No. 14, 3 C.F.R. 1007 (1949-1953 comp.). See Pet. App. 126. Contrary to petitioners' assumption, HUD did not base its debarment order on any authority it may possess to enforce federal labor standards. Rather, HUD proceeded under its own debarment regulations —regulations that were "issued under section 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d))," 24 C.F.R. 24.2 (1986)—and did not purport to apply DOL debarment provisions at all. See Pet. App. 120-121 (citing and applying HUD debarment provisions). Accordingly, HUD and DOL were not in privity for res judicata purposes.

b. Petitioners also assert (Pet. 16-18) that HUD and DOL asserted the same cause of action in their respective debarment proceedings. Petitioners err, however, in assuming that the causes of action asserted in the two proceedings were the same merely because they both arose, in a broad sense, from the same general set of facts. As this Court has long recognized:

> A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. * * * The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. The thing, therefore, which in contemplation of law as its cause, becomes a ground for action, is not the group of facts alleged in the declaration, bill, or indictment, but the

> result of these in a legal wrong, the existence of which, if true, they conclusively evince.

Baltimore S.S. Co. v. *Phillips*, 274 U.S. 316, 321 (1927) (internal quotation marks and emphasis omitted). Thus, the appropriate inquiry is not solely "whether the material facts * * * are the same," but also "whether the acts and the demand for relief are the same" and "whether the theory of recovery is the same." Pet. App. 13.

It is readily apparent that the HUD and DOL debarments were based on separate and distinct "legal wrongs." The HUD debarment was based on the criminal convictions of Facchiano Construction Company and Michael Facchiano, Jr., for mail fraud, while the DOL debarment proceeding was based on petitioners' willful and aggravated violations of the labor standards requirements. Pet. App. 13-14, 44-52, 120-121.[10] Accordingly, "[w]hat was material to the HUD proceeding was the criminal conviction and mitigating factors that would demonstrate [that] the Company was now a 'responsible' party that could again be entrusted with HUD contracts," whereas "[t]he facts material to the DOL proceeding were

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[10] Moreover, as the court of appeals observed (Pet. App. 13), the parties to the two debarments were not the same, because the HUD debarment applied only to Michael Facchiano, Jr., and the company, whereas DOL also sought debarment of Michael Facchiano, Sr., and John Facchiano. That difference in parties serves to highlight the fact that the cause of action was different in each proceeding: HUD could proceed only against the company and Michael Facchiano, Jr., because it was seeking debarment based solely on prior criminal convictions; DOL, on the other hand, sought debarment based on petitioners' willful violations of federal labor standards, and accordingly was able to proceed against all four petitioners.

actual evidence of the violations, the extent and nature of the misclassification and underpayments, evidence of previous violations and falsification of the certified payrolls." *Id.* at 13-14.

Moreover, the demand for recovery in the two proceedings was different. DOL properly sought a government-wide debarment under its regulations, whereas HUD's regulation allowed that agency to seek debarment only from HUD programs. Pet. App. 14. Thus the causes of actions in the two proceedings were not the same for purposes of res judicata.[11]

2. Petitioners also contend (Pet. 20-23) that the court of appeals erred in holding that the DOL regulations permit debarment of individual corporate officers for Davis-Bacon Related Acts violations. That contention involves only a narrow question of regulatory interpretation upon which no other court

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[11] Petitioners also contend (Pet. 18 n.6) that their debarment was precluded by the doctrine of collateral estoppel. Under that doctrine, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana* v. *United States*, 440 U.S. at 153; see *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979). As discussed above, however, HUD and DOL are not the same party or in privity for purposes of preclusion, and thus the doctrine of collateral estoppel has no application. Moreover, petitioners err in suggesting (Pet. 18 n. 6) that the remedial issue in both debarment proceedings was the same. The issue of HUD's appropriate response to the mail fraud convictions of Facchiano Construction Company and Michael Facchiano, Jr., is plainly distinct from the issue of DOL's appropriate response to petitioners' willful and aggravated violations of federal labor law, and thus collateral estoppel would be inapplicable even if HUD and DOL were in privity.

of appeals has expressed a view, and accordingly it is not appropriate for review by this Court. In any event, the decision below properly applied settled principles of deference to agency regulatory interpretation.

The Davis-Bacon Act debarment provision, 29 C.F.R. 5.12(a)(2) (1986), authorizes the debarment of "contractors or subcontractors and their responsible officers." The parallel provision applicable to the Davis-Bacon Related Acts, 29 C.F.R. 5.12(a)(1) (1986), refers only to the debarment of "contractor[s] and subcontractor[s]." As the court of appeals correctly observed (Pet. App. 17), however, no particular significance can be attached to the absence of the term "responsible officers" in Section 5.12(a)(1) of the regulations, because the two regulatory provisions were drafted at different times.

If anything, the reference to "responsible officers" in the Davis-Bacon regulation bolsters the Secretary's interpretation of subsection 5.12(a)(1), because there is "no rational reason for including debarment of responsible officers in one regulation, but not the other." Pet. App. 16. Both the Davis-Bacon Act and the Related Acts "are designed to ensure the cooperation of the employer, largely through self-enforcement, in complying with the [statutory] requirements," and the Secretary's interpretation of his regulation rationally advances those statutes' shared purposes. Pet. App. 16. Indeed, debarment of responsible officers "may in fact be the only realistic means of deterring contractors from engaging in willful [labor] violations based on a cold weighing of the costs and benefits of non-compliance." *Ibid.* (internal quotation marks omitted). Thus, rejection

of the Secretary's construction of the regulation would frustrate the purpose of the statutory scheme that the regulation is intended to implement.

Moreover, the Secretary has consistently read 29 C.F.R. 5.12(a)(1) (1986) to authorize the debarment of individual responsible officers. See Pet. App. 16, 50. Even if Section 5.12(a)(1) were ambiguous, therefore, the Secretary's reasonable and consistent view would be entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). See also *Martin* v. *OSHRC*, 111 S. Ct. 1171, 1175-1176 (1991); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). Because the Secretary's conclusion that Section 5.12(a)(1) encompasses responsible officers is both reasonable and consistent with the regulatory language and purpose, the court of appeals correctly upheld the debarment of Michael Facchiano, Jr., and John Facchiano.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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